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Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1993

KIDDER, PEABODY & CO.,
PETITIONER,

v.

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Section 27A of the Securities Exchange Act of 1934, as amended by Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("Section 27A"), directs courts to reinstate §10(b) causes of action dismissed as time barred pursuant to this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, ____ U.S. ____, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), including those whose judgment of dismissal was final at the time Section 27A was signed into law.

The question presented is whether, consistent with the doctrines of separation of powers and vested rights inherent in a final judgment, Congress may retroactively set aside final judgments.

2. Respondent in the case at bar excluded from its notice of appeals the dismissal of the §10(b) cause of action, yet specifically included the dismissal of other causes of action.

The question presented is whether an unappealed portion of a judgment becomes unreviewable and therefore final after the expiration of the time for appeal.

LIST OF PARTIES

Petitioner in this Court (Defendant-Appellee below) is Kidder, Peabody & Co.[1] Respondent (Plaintiff-Appellant below) is Cooperativa de Ahorro y Credito Aguada.

Defendants-Appellees in the Proceedings below, but who are neither Petitioners nor Respondents to this petition, are Paine Webber Incorporated, Ramon M. Almonte, Mayleen Gratacos and the Community Property existing between the last two.

Pursuant to Supreme Court Rule 29.4(b) Petitioner states that the constitutionality of an Act of Congress was drawn into question in the District Court for the District of Puerto Rico and the United States Court of Appeals for the First Circuit. The District Court certified that fact to the Attorney General pursuant to 28 U.S.C. sec. 2403(a). The United States did not intervene in the case. Because the constitutionality of an Act of Congress is also being questioned in this proceeding, 28 U.S.C. §2403 may be applicable and, therefore, this document is being served on the United States Solicitor General.

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[1] Kidder, Peabody & Co., is a wholly-owned subsidiary of Kidder, Peabody Group, Inc., which is a wholly-owned subsidiary of General Electric Financial Services, Inc., which in turn is a wholly-owned subsidiary of General Electric Company, a corporation that has issued shares to the public. Kidder, Peabody & Co. has only one subsidiary company that is not wholly-owned which is Kidder, Peabody Sales Agency of Ohio.

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ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Kidder, Peabody & Co., hereby respectfully petitions for a writ of certiorari to be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this case on May 19, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 993 F.2d 269 (1st Cir. 1993) and is reprinted in the appendix hereto, App. A-1. There are three separate opinions and orders of the United States District Court for the District of Puerto Rico. They are reported at 758 F.Supp. 64 (D.P.R. 1991), 777 F.Supp. 153 (D.P.R. 1991), and 799 F.Supp. 261 (D.P.R. 1992). This last opinion and order is also reprinted in the Appendix hereto. App. A-9.

JURISDICTION

The Court of Appeals rendered its decision on May 19, 1993. App. A-1. Judgment was entered on that same day. App. A-9. On May 27, 1993, Petitioner requested an extension of time of ten days, that is, until June 14, 1993, to file a Petition for Rehearing and a Suggestion that a Case be Reheard En Banc. App. A-22. The Court of Appeals granted the extension requested on June 1, 1993. App. A-24. Thereafter, on June 10, 1993, Petitioner filed a timely Petition for Rehearing, with a Suggestion that the Case be Reheard En Banc. App. A-25. On June 23, 1993, the United States Court of Appeals for the First Circuit denied this Petition. App. A-20. On September 13, 1993, Justice David H. Souter signed an Order extending the time for filing this petition for certiorari to, and including, October 11, 1993. App. A-56.

The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

STATUTES INVOLVED

1. 15 U.S.C. § 78aa-1 (Section 27A of the Securities Exchange Act of 1934 as amended by Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991):

> (a) EFFECT ON PENDING CAUSES OF ACTION. — The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation provided by the laws applicable in the jurisdiction including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) EFFECT ON DISMISSED CAUSES OF ACTION — Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 —

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

2. Federal Rule of Appellate Procedure 3(c):

(a) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

3. Federal Rule of Appellate Procedure 4(a)(1):

In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

STATEMENT OF THE CASE

Starting on June 23, 1986 and continuing until December 16, 1986, the Respondent herein, Cooperativa de Ahorro y Credito Aguada, a savings and loan cooperative, bought high yield Drexel Burnham bonds through Petitioner, Kidder Peabody & Company, and its employee, Mr. Ramon Almonte. Subsequently, the value of the bonds dropped and were liquidated for less than their original principal value.

As a result of this loss, on December 28, 1989, Respondent filed a complaint in the United States District Court for the District of Puerto Rico, which it later amended, alleging three broad categories of claims against Petitioner and other codefendants, namely: (1) federal securities claims for violation of, among others, §10(b) of the Securities Exchange Act of 1934, (2) RICO, 18 U.S.C. § 1962(a), (b) and (c); and (3) pendent local fraud claims. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction), under Section 27 of the Securities Exchange Act of 1934, under Section 22 of the Securities Act of 1933 and under 18 U.S.C. § 1961, *et seq.*

On January 25, 1991, the District Court dismissed all RICO causes of action against Petitioner and codefendant Paine Webber, all but one RICO claim against codefendant Ramon Almonte, and all the Federal Securities Claims against codefendant Paine Webber. *Cooperativa de Ahorro y Credito Aguada* v. *Kidder Peabody & Co.*, 758 F.Supp. 64 (D.P.R. 1991).

Thereafter, on October 31, 1991, the District Court issued a second opinion and order dismissing the remaining claims against all the parties in the case. *Cooperativa de Ahorro y Credito Aguada* v. *Kidder Peabody & Co.*, 777 F.Supp. 153 (D.P.R. 1991). The claim against Petitioner based on §10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b) (hereinafter "§10b"), was dismissed by the district court as time barred following this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, ____ U.S. ____, 111 S.Ct.

2773, 115 L.Ed.2d 321 (1991). In *Lampf*, this Court established a limitation period for §10b claims of three years from the occurrence of the fraud or one year from the discovery of the fraud. Since the alleged fraud occurred more than three years before the complaint was filed, the District Court concluded that the §10b cause of action was time barred. *Cooperativa de Ahorro Y Credito Aguada* v. *Kidder Peabody*, 777 F.Supp. at 156.[2]

On November 27, 1991, Respondent filed the following Notice of Appeal:

> NOTICE is hereby given that the above named plaintiff, Cooperativa de Ahorro y Credito Aguada, hereby appeals to the United States Court of Appeals for the First Circuit from the Opinion and Order entered in this action on the 31st day of October 1991, dismissing the claim against defendant Ramon Almonte under 18 U.S.C. sec. 1962(c) for failing to state a cause of action, and declining to exercise pendent jurisdiction and thereby dismissing without prejudice all local law fraud claims.

App. A-42. The dismissal of the federal securities claims, including the §10b cause of action, was not mentioned in this Notice.

On December 19, 1991, the Federal Deposit Insurance Corporation Improvement Act of 1991 was signed into law. Section 476 of this Act amended Section 27A of the Securities Exchange Act of 1934 (hereinafter "Section 27A") for the sole purpose of restricting *Lampf* to a prospective application and to subject §10(b) causes of action filed prior to June 19, 1991 (the day before this Court issued *Lampf*), to the limitations period applicable in the jurisdiction on June 19, 1991. Section 27A applies to pending as well as to dismissed §10b causes

[2] The District Court applied *Lampf* retroactively as was required by *James B. Beam Distilling Corp.* v. *Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991).

of action, including those whose judgment of dismissal was final at the time of its enactment.[3]

On December 27, 1991, Respondent requested a reinstatement of all its federal securities claims pursuant to Section 27A[4]. Petitioner opposed the reinstatement arguing, *inter alia*, that Section 27A is unconstitutional, for it violates the doctrine of separation of powers and deprives Petitioner of its constitutionally protected vested right inherent in an unreviewable final judgment.

In an opinion dated September 4, 1992, the District Court denied Respondent's Motion for Reinstatement concluding that Respondent did not meet the requirement of Section 27A that the case "would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction as such laws existed on June 19, 1991." *See* 799 F.Supp. 261 (D.P.R. 1992), App. A-10. The District Court found that the "applicable law in the jurisdiction" was the two year statute of limitations of Puerto Rico's Securities Act, 10 L.P.R.A. § 890(e). Furthermore, relying primarily on national news publications, the District Court ruled that, for purposes of the federal doctrine of fraudulent concealment, Respondent should have known that the "high yield bonds sold by Drexel were accompanied by an equally high risk". 799 F.Supp. at 264, App. A-15. Therefore, the Court added, the statute of limitations began to run the day of the purchase of the bonds, which occurred more than two years before the complaint was filed. *Id.* at 266, App. A-17, A-18.

Respondent appealed and the First Circuit reversed concluding that the District Court committed reversible error in relying on materials outside of the pleadings in reaching its conclusion as to when the statute of limitations began to run. *Cooperativa de Ahorro y Credito Aguada* v. *Kidder Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993), App. A-1. As to

[3] See pages 2, 3, *supra*, for complete text of Section 27A.

[4] Respondent requested the reinstatement of all its federal securities causes of action even though Section 27A purports to reinstate only those based on §10(b).

Petitioner's constitutional arguments, which were presented as an alternative ground for affirmance, the Court of Appeals cursorily dismissed them with the following statement:

> Finally, defendants offer an alternative ground for affirming the district court's dismissal of the Coop's claims, claiming that Section 27A is constitutionally infirm. For the reasons persuasively stated in *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533, 1543-47 (10th Cir. 1992, *cert. denied*, No. 92-1009, 1992 WL 391280 (April 19, 1993), we reject defendants' constitutional challenges to Section 27A. *See also Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1571-75 (11th Cir. 1992); *Berning* v. *United States*, No. 91-3318, 1993 WL 84590, 5-7 (7th Cir. March 25, 1993).

Id. at 273, App. A-7. In footnote 11, the First Circuit added:

> Beyond *Anixter*, we add only the following comment in order to address defendants' argument that Section 27A unconstitutionally deprives them of a vested property right. It is well established that a party's property right in a cause of action does not vest "until a final, unreviewable judgment has been obtained." *Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986). *See also Hoffman* v. *City of Warwick*, 909 F.2d 608, 621 (1st Cir. 1990). At the time that Section 27A was signed into law, no final judgment had been entered in the instant case. Accordingly, defendants' argument that Section 27A deprived them of a vested property right is without merit.

Id. at 273, n. 11, App. A-8.

On June 10, 1993, Petitioner filed a petition for rehearing with a suggestion that the rehearing be *en banc*, in which it requested reconsideration of the Court's rejection of the constitutional arguments App. A-25. Petitioner argued that the panel erred in its determination that the dismissal of the § 10b

cause of action was not final at the time Section 27A was enacted and, furthermore, that the panel's reliance on *Anixter* v. *Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied sub. nom. Dennler* v. *Trippet*, ____ U.S. ____, 113 S.Ct. 1841, 123 L.Ed.2d 467 (1993), was misplaced since *Anixter* was a pending case. That petition was denied on June 23, 1993. App. A-20.

REASONS FOR GRANTING THE WRIT

Section 27A retroactively changed the statute of limitations of §10b causes of action and made it applicable to cases dismissed as time barred pursuant to *Lampf* and *Beam*, including those whose judgment of dismissal had become final. This Congressional action presents several important questions which require this Court's immediate intervention and which are raised in this appeal.

Section 27A is unconstitutional insofar as it retroactively orders the reinstatement of claims disposed by final judgments and thereby violates the separation of powers doctrine and affects the property rights vested and inherent in a final judgment. The resolution of this matter will affect not only the parties in this case and those in other Section 27A cases but, more importantly, will provide an indispensable guidance to the lower courts and to the other branches of government, as to under what circumstances, if any, Congress may set aside final judgments.

Furthermore, the resolution of the issues presented in this petition is important to resolve conflicts which have arisen among circuit courts and numerous district courts. As explained fully below, the constitutionality of Section 27A has been and continues to be the source of an enormous amount of expensive and complicated litigation with conflicting results. This Court's intervention to provide uniformity and guidance on the matter is imperative.

Finally, this Court's intervention is needed to correct the First Circuit's error in rejecting petitioner's constitutional

claims. The First Circuit grounded this rejection on the erroneous conclusion that the judgment of dismissal of the §10b cause of action was not final.[5] Should this Court find Section 27A unconstitutional only as it applies to cases whose judgment of dismissal had become final, Petitioner will not benefit from the decision because of the First Circuit's erroneous determination that the dismissal of the §10(b) cause of action was not final at the time Section 27A was enacted.

In sum, this petition meets all the criteria to move this Court to review the questions presented. It presents an issue of utmost importance and provides this Court with the opportunity to give uniformity and certainty to an area of the law plagued with confusion and in dire need of this Court's authoritative voice.

I. This Petition Presents The Important And Uncertain Question Of Whether, Consistent With The Doctrines Of Separation Of Powers And Vested Rights Inherent In A Final Judgment, Congress May Retroactively Set Aside Final Judgments.

This case presents issues whose significance transcends the parties to this litigation and the narrow controversy of the constitutionality of Section 27A. Indeed, it involves the constitutionality of any legislation which disturbs final judgments. Although this Court has considered the matter on a few occasions under a variety of arguments, including separation of powers as well as due process challenges, the direct precedents are not recent. Furthermore, the current opinions of this Court that shed some light on this Court's position, have been the subject of conflicting analysis. There is

[5] The First Circuit also based its decision to reject petitioner's constitutional arguments on "the reasons persuasively stated in *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533, 1543-47 (10th Cir. 1992), *cert. denied*, 1992 WL 391280 (April 19, 1993)." As discussed in Part III of this Petition, *infra*, it is clear that reliance on *Anixter*, a case which was pending when Section 27A was enacted, is misplaced.

enormous uncertainty and confusion among lower courts as evidenced by the lack of uniformity of the decisions rendered by them on this subject. This case presents an excellent opportunity to provide guidance on the matter, not only to lower courts, but also to the other branches of the government.

A. *Section 27A is unconstitutional since, in upsetting final judgments, Congress violated the doctrine of separation of powers*

In *Lampf* and *Beam*, this Court determined the statute of limitations applicable to §10b causes of action and that it should be applied retroactively. By enacting Section 27A(b), and thereby ordering the reinstatement of causes of action whose judgment of dismissal pursuant to *Lampf* and *Beam* had become final, Congress is in effect reviewing judicial judgments as it if were an appeals court. Such exercise of judicial power transcends the boundaries of permissible congressional action and intrudes into an area reserved by the Constitution exclusively to the Art. III Courts of the United States.

More than two hundred years ago, the judges in the seminal *Hayburn's* case, 2 Dall 409 (1792) stated:

> no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested.

Id. at 413, n.4. This Court has reiterated this view in every instance in which it has squarely confronted the issue. *See e.g.*, *United States* v. *Ferreira*, 13 Howard 40, 44 (1851); *United States* v. *O'Grady*, 22 Wall 641, 647 (1875); *Pope* v. *United States*, 323 U.S. 1, 8-9 (1944); *Chicago and Southern Airlines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113-114 (1948) ("It has . . . been the firm and unvarying practice of Constitutional Courts to render no judgments . . . that are

subject to later review or alteration by administrative action").

The *Hayburn's* case current vitality is evident from this Court's decision in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980). At issue in *Sioux Nation* was the constitutionality, under the doctrine of separation of powers, of an act of Congress which instructed the Court of Claims to review the merits of a claim against the United States which that court had previously ruled was barred by *res judicata*. In validating the statute, this Court carefully limited its decision, basing it on Congress' power to waive the defense of *res judicata* available to the United States and on Congress' constitutional power, under Article I of the Constitution, to pay national debts. After quoting from *Cherokee Nation* v. *United States*, 270 U.S. 476 (1926), this Court stated:

> The holding in Cherokee Nation that Congress has the power to waive the *res judicata* effect of a prior judgment entered in the Government's favor on a claim against the United States is dispositive of the question considered here. Moreover, the holding is consistent with a substantial body of precedent affirming the broad constitutional power of Congress to define and "to pay the Debts . . . of the United States" U.S. Const., Art. I §8, cl 1. That precedent speaks directly to the separation of powers objections discussed above.

Sioux Nation, 448 U.S. at 397. In all of the precedents cited by this Court in *Sioux Nation* Congress had waived the defense of *res judicata* where a debt against the United States was claimed.[6]

The fact that this Court in *Sioux Nation* went through great pains to base the validity of the retroactive application of a statute that upsets final judgments on Congress' power to

[6] In addition to *Cherokee Nation*, this Court relied on *Pope* v. *United States*, 323 U.S. 1 (1944) and *Nock* v. *United States*, 2 Ct. Cl. 451 (1867).

waive the defense of *res judicata* in cases where the United States is a party and on its power to pay the debts of the United States, speaks eloquently. Where those circumstances are not present, the doctrine of separation of powers prohibits an Act of Congress which has the effect of encroaching upon the affairs of the judicial branch by upsetting final judgments.[7]

Despite these decisions, there is confusion on this subject. First, of course, is Congress' enactment of Section 27A(b), particularly its directive to set aside final judgments. Second, the uncertainty persists among lower courts as well. A clear example of this confusion is the conflicting results reached by the two courts of appeals which have reviewed the constitutionality of Section 27A(b) as applied to final judgments under a *Hayburn's* case separation of powers argument. *Compare Plaut* v. *Spendthrift Farm, Inc.*, 1993 WL 290399 (6th Cir. 1993) with *Pacific Mutual Life Insurance Co.* v. *First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993).[8]

The discussion above shows that the intervention of this Court is imperative to clarify whether Congress may enact laws which apply retroactively to disturb final judgments. The implications of this decision are enormous. If Section 27A (b), as it applies to final judgments, is valid, there appears to be no limit to Congress' power to review judicial judgments and indeed to position itself beyond the legislative sphere and above the judicial branch. Such encroachment upon the affairs of the judiciary is clearly at odds with the independence of the judicial branch and with the balance that must exist among all branches of government. *See Metropolitan Washington Airports Authority* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, ____ U.S. ____, 115 L.Ed.2d 236,

[7] There is another separation of powers argument that has been and continues to be frequently raised in Section 27A cases. Based on *United States* v. *Klein*, 80 U.S. 128 (1871), it is sometimes argued that Section 27A infringes upon the powers of the judiciary by prescribing the rule of decision in those cases. That particular separation of powers argument, which does not require a final judgment, is not raised in this petition.

[8] See pages 16-17, *infra*, for a discussion of the conflicting results reached in these two cases.

256-57 (1991); *Mistretta* v. *United States*, 488 U.S. 361, 382 (1989). This Court's authoritative view on the matter is, therefore, urgently needed.

B. *By mandating the reopening of cases in which judgments had been rendered and become final, Section 27A(b) deprives Petitioner of its constitutionally protected vested right inherent in a final judgment.*

In reversing judgments that are final, Section 27A treads upon long standing Supreme Court doctrine setting the boundaries of permissible legislative intervention into judicial decisions. As this Court unequivocally stated in *McCullough* v. *Virginia*, 172 U.S. 102, 123-124 (1898):

> It is not within the power of the legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

The respect and deference to be accorded to final judgments that finds support in, and stems from, this language has been reiterated by this Court in subsequent decisions that are still good law. "The private right of parties which have been vested by the judgment of the court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." *Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923). Even when considering the appropriateness of Congressional action affecting pending or not yet final cases, this Court has recognized the special treatment and deference to be accorded to final judgments. As stated in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431 (1856):

> . . . the act of Congress cannot have the effect and operation to annul the judgment of the Court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication of the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it. . . . Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress.

Some lower courts have relied on *Chase Securities Corp.* v. *Donaldson*, 325 US. 304 (1945), to substantiate their rejection of the vested rights doctrine. *See e.g.*, *Pacific Mutual Life Insurance* v. *First Republicbank Corp.*, 997 F.2d 39, 50 (5th Cir. 1993); *Anixter* v. *Home-Stake Production Co.*, 977 F.2d 1533, 1546 (10th Cir. 1992). In particular, these courts embrace the following language in *Chase:*

> Assuming that statutes of limitations, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment.

Chase, 325 U.S. at 315-16.

These courts' reliance on *Chase* is, however, inapposite. The *Chase* court went to great length and great pains to manifest that the above quoted language refers to changes in the law that affect pending cases. Said language followed the statement that the situation was "not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor." *Id.* at 310. Indeed, *Chase* clarified that the constitutionality

of the statute challenged therein was upheld precisely because there was no final adjudication and, therefore, no rights inherent in a final judgment had vested:

> . . . the existence of the [statute of limitations] policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication. Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a Federal Constitutional right.

Id. at 316. Therefore, *Chase* supports Petitioner's contention that final judgments vest federal constitutional rights that Congress cannot divest.

In sum, the rights vested by, and inherent in, a final judgment cannot be set aside at the whim of Congress. This Court has stated so categorically and has not reversed the cases upon which these precepts rest.

II. There Is Conflict Among The Circuits As To The Constitutionality Of Section 27A And As To The Precedential Value And Correct Interpretation Of Various Important Supreme Court Decisions.

A. *There is conflict among the circuits regarding the constitutionality of Section 27A.*

The constitutionality or unconstitutionality of Section 27A has been the source of protracted and expensive litigation with divergent results. The uncertainty of its constitutionality as interpreted by the various circuits[9] that have considered it

[9] We have focused on the conflict between the circuits without disregarding the conflicts within and between the districts. A complete list to the extent possible of district court cases which have dealt with the constitutionality of Section 27A is included in the Appendix. *See* A-57. The same uncertainty and misstatements, misinterpretations, and misapplications

undercuts this Court's directives of uniformity and predictability of interpretation and application of its precedents. There is a direct conflict among the circuits regarding the constitutionality of Section 27A. The majority of the circuit court opinions that have declared 27A to be constitutional, have focused and addressed the constitutionality of applying Section 27A to pending cases.[10]

On the other hand, three courts of appeal have reviewed the constitutionality of Section 27A(b) in cases where the dismissal of the §10b cause of action was a final judgment. In its opinion below, the First Circuit did not discuss this matter for it erroneously concluded that the dismissal of the §10b cause of action was not final.[11] Two circuits, however, have squarely confronted this issue under similar arguments. *Compare Pacific Mutual Life Insurance Co.* v. *First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993) with *Plaut* v. *Spendthrift Farm, Inc.*, ____ F.3d ____, 1993 WL 290399 (6th Cir. August 3, 1993). The material facts in those cases, as well as in this case, are identical. In all of them in the §10b causes of action had been dismissed as time barred pursuant to

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of precedent that have characterized the differing opinions within and among the circuits are found within and among the district court opinions.

[10] *Axel Johnson, Inc.* v. *Arthur Andersen & Co.*, 1993 WL 379533 (2nd Cir. Sept. 27, 1993), *Cooke* v. *Manufactured Homes, Inc.*, 998 Fed. 1256 (4th Cir. 1993), *Berning* v. *A.G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993), *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993), *Anixter* v. *Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1841 (1993), *Henderson* v. *Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), *petition for cert. filed* June 25, 1993.

[11] Petitioner argued the unconstitutionality of Section 27A as it applies to final judgments to the District Court (Kidder's Opposition to Plaintiff's Motion for Reinstatement of Action, pages 23-26) and to the First Circuit (Brief for Appellee Kidder Peabody & Co. at 33-35), but neither one reached it. The District Court did not reach the constitutional arguments by concluding that the complaint was time barred even under the statute of limitations established by Section 27A. The First Circuit did not reach this particular constitutional argument since it erroneously held that the dismissal of the §10b cause of action was not final at the time Section 27A was signed into law. However, inasmuch as *Anixter*, on which the First Circuit also relied, rejected this argument, albeit in a *dicta*, it can be said that the First Circuit also rejected it.

Lampf and the dismissal had become final before Section 27A was enacted. Therefore, at issue was the constitutionality of Section 27A(b) as it applies to cases whose judgment has become final.

In *Plaut*, the Sixth Circuit concluded that 27A(b) is unconstitutional, for it violates the rule established in the *Hayburn's* case that, as a protection of the separation of powers, Congress may not retroactively disturb final judgments. *Plaut*, at *5. In *Pacific Mutual Life*, however, the Fifth Circuit rejected this same argument in finding Section 27A constitutional. *Pacific Mutual*, 997 F.2d at 54.[12]

Thus, there is an irreconcilable conflict between the circuits which can only be resolved by this Court. The resolution of this conflict will not only benefit the parties in this case and other Section 27A cases pending in the district courts and the circuit courts, it will provide much needed guidance as to the appropriateness of retroactively disturbing final judgments through legislation.

B. *There is conflict among the circuits in the interpretation and precedential value of several important decisions of this Court.*

The intervention of this Court is urgently needed to clarify not only the constitutionality of Section 27A, but also to

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[12] In rejecting the *Hayburn's* case argument, the *Pacific Mutual Life* court relied primarily on *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) and *United States* v. *Schooner Peggy*, 5 U.S. 103 (1801). Reliance on these cases is misplaced.

As stated above, *Sioux Nation* refers to a particular line of cases in which Congress waives the *res judicata* defense available to the United States in cases where a claim is made against the United States, not against private parties.

Schooner Peggy, on the other hand, established the well recognized doctrine that courts (including courts of appeals) generally apply the law which exists when they decide. *See also*, *e.g.*, *Robertson* v. *Seattle Audubon Society*, ___ U.S. ___, 112 S.Ct. 1407, 118 L.Ed.2d 87 (1992). This is likewise inapplicable where the law is intended to apply retroactively to final cases, as is the intention of Section 27A(b).

restore uniformity to its precedents. These have been applied and misapplied, quoted and misquoted, interpreted and misinterpreted, extended and limited, by the circuit courts in elaborating the reasons for the constitutionality or unconstitutionality of section 27A. The conflict and confusion extend beyond the holdings to the interpretation of basic and pure constitutional axioms and to determinations of what is still good law. When faced with similar situations regarding conflict between the circuit courts, misinterpretations of cases by the circuit courts or even refusals to follow this Court's rules of interpretation, this Court has granted the petition for certiorari.[13]

A good example of this utter confusion is the disparate interpretation and treatment which different courts of appeal give to *Chase Securities* v. *Donaldson*, 325 U.S. 304, 315-316 (1945). In rejecting defendants' vested rights argument, the Tenth Circuit in *Anixter* cites the following language from *Chase Securities* v. *Donaldson:*

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[13] *See United States* v. *Edge Broadcasting*, ____ U.S. ____, 125 L.Ed.2d 345, 354 (1993) ("Because the court below declared a federal statute unconstitutional and applied reasoning that was questionable under our cases relating to the regulation of commercial speech, we granted certiorari . . ."); *Harper* v. *Virginia Dept. of Taxation*, ____ U.S. ____, 125 L.Ed.2d 74, 81 (1993) (". . . we hold that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision."); *United States* v. *California*, ____ U.S. ____, 123 L.Ed.2d 528, 536 (1993) ("The court of appeals acknowledged that the Court of Appeals for the Eleventh Circuit, in a factually similar case, recently had reached the opposite conclusion. (citations omitted) In *U.S.* v. *Broward County*, the Eleventh Circuit rejected the argument on which the Ninth Circuit relied and held . . ., we granted certiorari."); *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, ____ U.S. ____, 120 L.Ed.2d 615, 623 (1992) ("We granted certiorari to resolve the conflict among the Courts of Appeals . . ."); *Estate of Cowart* v. *Nicklos Drilling*, ____ U.S. ____, 129 L.Ed.2d 379, 388 (1992) ("We granted certiorari because of the large number of LHWCA claimants who might be affected by the Court of appeals decision."); *United States* v. *Gaddis*, 424 U.S. 544, 547 (1976) ("We granted certiorari because of the discordant views in the Circuits regarding the proper application of the Hefflin and Milanovich decisions . . ."); *Schlude* v. *Commissioner*, 372 U.S. 128, 130 (1963) ("we brought the case back once again to consider whether the lower court misapprehended the scope of

> The Fourteenth Amendment does not make an act of legislation void merely because it has some retrospective operation. What it does forbid is the taking of life, liberty or property without due process of law. . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the constitution, certainly it cannot be said lifting the bar to a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the fourteenth amendment.

Anixter, 977 F.2d at 1546.

The use of this quote disregards the admonition this Court voiced and reiterated throughout the *Chase* opinion — there had been no final adjudication of the case before the change in the law. *See Chase* at 305, 306, 310, and 316.

The Fifth Circuit in *Pacific Mutual*, 997 F.2d at 50, cites the same language as *Anixter*, even though it faced a final judgment. Furthermore, it downgraded the precedential value of *Chase* by stating that *Chase* predates two cases where allegedly this Court has acquiesced to situations like the one created by Section 27A(b):

> *Donaldson* predates both *Fleming* and *Usery*, which we understand to establish that Congress may affect final judgments under some circumstances.

Pacific Mutual, 997 F.2d at 50.[14]

American Auto. Assoc., . . ."); *Wilkinson* v. *United States*, 365 U.S. 399, 401 (1961) ("We granted certiorari to consider the petitioner's claim that the court of appeals had misconstrued the meaning of the Barenblatt decision."); *Brein* v. *Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 130 (1959) ("We granted the petition for certiorari because that decision seemed to be out of line with the authorities . . .").

[14] This interpretation of *Flemming* v. *Rhodes*, 331 U.S. 100 (1947) and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) is incorrect. Neither *Flemming* nor *Isery* involved a statute like Section 27A that requires courts

In direct contrast to these interpretations of *Chase* by the Fifth and Tenth Circuit Courts, the Sixth Circuit, in *Plaut* read *Chase* correctly and stated:

> While *Chase Securities* decision's description of the legislature's power to change statutes of limitations retroactively is indeed sweeping, this language conclusively shows both that the Court believed dismissals of time barred claims to be 'final judgments' and that the Court did not view this legislative power as extending to require that courts substitute a new limitation period in cases finally decided under a previously applicable one.

Plaut *8. *See also Axel Johnson Inc.* v. *Arthur Andersen, Co.*, 1993 WL 379533 (2nd Cir. Sept. 27, 1993) (same reading of *Chase's* holding).

The circuits are clearly at odds regarding *Chase's* holding and whether it applies only to pending cases or also to those that have been finally adjudged. Furthermore, the circuits are in conflict as to whether *Chase's* holding has been affected by later decisions that allegedly permit final judgments to be upset as Congress deems necessary.

There is also a conflict among the circuits on whether, for purposes of the arguments on the constitutional infirmities of Section 27A(b) as it applies to final judgments, a judgment of dismissal by the application of a statute of limitations has the same "finality", as a judgment rendered on the merits of the case. The language in *Chase* regarding the legislature's power to change statutes of limitations retroactively is quite broad and the discussion, together with the test enunciated, have served as basis for the conclusion of some circuits that judgments by the operation of "mere legislated technicalities" are not really on the merits, and therefore not subject to the

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to rule again on cases which have finally decided past conduct. Rather, they stand for the proposition that Congress can regulate future actions, even when such actions may be based upon rights acquired through judgments. *See also, FHA* v. *Darlington*, 358 U.S. 84, 91 (1958).

same scrutiny. For instance, in *Anixter* v. *Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992) the Tenth Circuit stated:

> Legislation to alter such a technical defense, and its application even to dismissed cases, goes far less to the heart of the judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question.

Id. at 1546, (*quoting Axel Johnson, Inc.* v. *Arthur Andersen*, 790 F.Supp. 476, 483 (S.D.N.Y. 1992)).

In contrast, the Sixth Circuit rejected this same argument in *Plaut* by stating:

> While the *Chase Securities* decision's description of the legislature's power to change statutes of limitations retroactively is indeed sweeping, this language shows both that the Court believes dismissals of time barred claims to be "final judgments" and that the Court did not view this legislative power as extending to require that courts substitute a new limitation period in cases finally decided under a previously applicable one.

Plaut at *8.[15]

In light of the pervasiveness of statutes of limitations for causes of actions in the laws of the United States, the meritoriousness of dismissals under the same should be addressed and

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[15] Other Circuits, including the Court below, have concluded that a dismissal of a claim as time barred constitutes a judgment on the merits. *See e.g.*, *Kale* v. *Combined Insurance Co.*, 924 F.2d 1161, 1164 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 116 L.Ed.2d 44, 112 S.Ct. 69 (1991); *Rose* v. *Town of Harwick*, 778 F.2d 77, 80 (1st Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986); *Nilsen* v. *City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983) (en banc); *PRC Harris Inc.* v. *Boeing Co.*, 700 F.2d 894, 896 (2d Cir. 1983) *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983); *Ellington* v. *Burlington Northern, Inc.*, 653 F.2d 1327, 1330 n.3 (9th Cir. 1981); *Nathan* v. *Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1980).

clarified by this Court. The direct impact of any determination of this issue is beyond speculation, since statutes of limitations constitute one of the most commonly raised defenses.

Another source of conflict between the circuits in assessing Section 27A's constitutionality stems from the precedential value accorded to *McCullough* v. *Virginia*, 172 U.S. 102 (1898). The Fifth Circuit in *Pacific Mutual*, after giving the facts and holding of *McCullough*, states:

> our research indicates that the Court has never applied this holding in *McCullough* to decide another case. Moreover, both before and after *McCullough*, the Court has decided cases with identical relevant facts according to a different rule. Accordingly we must carefully scrutinize *McCullough's* rationale in assessing the precedential value of its broad statement concerning rights vested by judgment.

Pacific Mutual, 997 F.2d at 46-47.[16]

The Sixth Circuit in *Plaut* treats *McCullough* differently:

> The government asserts that *McCullough*, which the District Court cited in holding 27A(b) unconstitutional, was the only occasion where the Supreme Court held a statute unconstitutional under the "vested rights doctrine." Even if this be the case, we confess ignorance of the rule implied in the Government's argument that a single unreversed decision of the Supreme Court is not binding on the District Court, or on us. . . . However, we note that *McCullough* remains good law, including the holding quoted . . . even if the Supreme Court has not ruled on a similar case since." (citations omitted).

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[16] This statement by the Fifth Circuit is inapposite to this Honorable Court's directive "[b]ut unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts think it to be." *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982).

Plaut at *18 n. 13. See also *Axel Johnson, Inc.* v. *Arthur Andersen & Co.*, 1993 WL 379533 (2nd Cir. Sept. 27, 1993) (holding that *McCullough's* principle has been reiterated by subsequent Supreme Court decisions).

The examples cited above are but a few of the divergences and discrepancies on the precedential value of important cases decided by this Court. They are manifest examples of the imperative need for this Court's intervention and guidance not only as to the constitutional issue presented — whether Section 27A(b) is unconstitutional — but also as to the interpretation and importance of many of the cases used by the circuit courts in reaching their conflicting results.

III. The Decision Of The Court Of Appeals Is In Conflict With Decisions Of This Court.

The Court of Appeals based its rejection of Petitioner's constitutional arguments on two grounds. First, it concluded that there was no unreviewable final judgment in the case. Therefore, Petitioner's property rights in its judgment of dismissal had not vested.[17] *Cooperativa*, 993 F.2d at 273, note n.11, App. A-8. The second basis for the Court of Appeals decision on this matter was the constitutional analysis of Section 27A in *Anixter* v. *Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992) *Id.* at 273, App. A-7. The Court's decision was erroneous under both of these grounds.

A. *At the time Section 27A was signed into law there was an unreviewable, final judgment dismissing Respondent's federal securities law claims.*

Respondent did not appeal the part of the District Court's Judgment of October 31, 1991, dismissing the federal securities claims. Therefore, the dismissal of those claims became final and unreviewable on November 30, 1991. Accordingly,

[17] The Court apparently ignored the fact that, in addition to the vested rights argument, Petitioner had also made a separation of powers argument.

at the time Section 27A was signed into law on December 19, 1991, there was indeed an unreviewable and final judgment dismissing all the federal securities claims, including, of course, those claims under §10(b) which Section 27A(b) purports to reinstate.

The complant in this case alleged three broad categories of claims against Petitioner and other codefendants, namely federal securities claims, RICO, and pendent local fraud claims. On January 25, 1991, the District Court dismissed all RICO allegations as to Petitioner and co-defendant Paine Webber, all but one RICO claim against co-defendant Almonte and all the federal securities claims against Paine Webber. *Cooperativa de Ahorro y Credito Aguada* v. *Kidder Peabody & Co.*, 758 F.Supp. 64 (D.P.R. 1991). On October 31, 1991, the District Court issued an opinion and order dismissing the remaining claims, and on that same day entered the following judgment:

> Pursuant to the terms of an Opinion and Order announced by the court today, judgment is now entered as follows:
>
> 1. The court now DISMISSES all federal securities law claims. Claims under section 10(b) of the 1934 Securities Act, Rule 10b-5, 15 U.S.C. § 78j(b), are time-barred according to *Lampf*, as are claims under section 17(a) of the 1933 Act, 15 U.S.C. § 780(c)(1)(2), are also time-barred under section 29(b) of the 1934 act, 15 U.S.C. § 78cc(b). Claims under section 20 of the 1934 Act, 15 U.S.C. § 78t, are dismissed for failure to state a cause of action.
>
> 2. This court also DISMISSES the remaining section 1962(c) claim against defendant Almonte for failing to state a cause of action.
>
> 3. This court declines to exercise pendent jurisdiction and DISMISSES without prejudice all local law fraud claims.

> Accordingly, judgment is hereby entered dismissing the complaint as to all defendants.

Cooperativa de Ahorro y Credito Aguada v. *Kidder Peabody & Co.*, 777 F.Supp. 153 (D.P.R. 1991).

Thereafter, on November 23, 1991, Respondent filed the following timely Notice of Appeal:

> NOTICE is hereby given that the above named plaintiff, Cooperativa Ahorro y Credito Aguada, hereby appeals to the United States Court of Appeals for the First Circuit from the Opinion and Order entered in this action on the 31st day of October, 1991, dismissing the claim against defendant Ramon Almonte under 18 U.S.C. sec. 1962(c) for failing to state a cause of action, and declining to exercise pendent jurisdiction and thereby dismissing without prejudice all local law fraud claims.

See App. A-42.

Respondent decided to appeal only the dismissal of the causes of action included in paragraphs 2 and 3 of the October 31, 1991 Judgment, that is, the claim against co-defendant Almonte under 18 U.S.C. sec. 1962(c) (the only remaining RICO claim) and the district court's decision declining to exercise pendent jurisdiction on all local law fraud claims. Respondent purposely left out from its notice of appeal the dismissal of all federal securities law claims (Paragraph 1 of October 31, 1991 Judgment), including those under § 10(b) of the 1934 Securities Exchange Act, which Section 27A purports to reinstate.

Fed. R. App. P. 3(c) establishes the content of the notice of appeal. In its pertinent part it provides that "[t]he notice of appeal . . . shall designate the judgment, order, or part thereof appealed from . . ." Compliance with the requirements of Rule 3(c) is mandatory and jurisdictional. *Smith* v. *Barry*, ____ U.S. ____, 112 S.Ct. 678, 682, 116 L.Ed.2d 678,

685 (1992); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315-16 (1988).

Courts of appeals are required to construe liberally the mandates of Rule 3(c) to prevent a defeat of appellate jurisdiction by a mere technicality when the intent to appeal from a particular judgment, or part of it, is manifest or the litigant's actions are the functional equivalent of what the rule requires. *Smith* v. *Barry*, 112 S.Ct. at 681-682; *Torres* v. *Oakland Scavenger Co.*, 487 U.S. at 316-17; *Foman* v. *Davis*, 371 U.S. 178, 181 (1962). The crux of the inquiry as to who has appealed, or what has been appealed is the notice which the document affords to the other parties and to the court. *Smith* v. *Barry*, 112 S.Ct. at 682.

Applying these principles to this case, it is evident that Respondent failed to timely appeal the dismissal of the §10(b) cause of action.

The October 31, 1991 Judgment dismissed all the claims remaining in the case by categories and in separate paragraphs. *See* pages 24-25, *supra*. In its notice of appeal Respondent designated exclusively and specifically the causes of action dismissed in paragraphs 2 and 3 of the judgment, namely, "the claim against defendant Ramon Almonte under 18 U.S.C. Sec. 1962(c)" (paragraph 2 of the judgment) and the district court's decision declining to exercise pendent jurisdiction over the local law fraud claim (paragraph 3 of the judgment). *See* p. 25, *supra*. By affirmatively designating those two distinct parts of the judgment, Respondent clearly and unambiguously gave notice to the other parties and to the court that it was deliberately excluding from its appeal those causes of actions which were dismissed in paragraph 1 of the judgment, that is, the federal securities claims, including the §10(b) cause of action.[18]

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[18] Because of the manifest intention to exclude the undesignated parts of a judgment, courts of appeals of virtually all circuits have uniformly held that when, as here, an appellant specifically refers to only parts of a judgment in his notice of appeal, only the designated parts are appealed and, therefore, the Court lacks jurisdiction to review the undesignated parts. *See*

Moreover, an examination of the record, furthers the conclusion that Respondent intended to abandon its federal securities claims by not appealing their dismissal. In its "Motion for Voluntary Dismissal" filed with the Court of Appeals on December 30, 1991, Respondent stated:

> (1) The appeal noticed in this case referred to the dismissal of a certain 18 U.S.C. § 1862(c) claim against Appellee defendant Ramon M. Almonte entered in this action on October 31, 1991. (Docket #66). That ruling by the District Court also dismissed certain federal securities law claims made by the appellant on the authority of the Supreme Court's decision in *Lampf, Pleva Lipkind Prupis & Petigrow* v. *Gilbertson*, ____ U.S. ____, 111 S.Ct. 2773 (1991). No appeal was filed concerning those claims.

App. A-44. Furthermore, on page 3 of its Motion Requesting

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e.g., *Lusardi* v. *Xerox Corp.*, 975 F.2d 964, 972 (3d Cir. 1992); *Pope* v. *MCI Telecommunication Corp.*, 937 F.2d 258, 266 (5th Cir. 1991) *cert. denied*, 118 L.Ed.2d 558, 112 S.Ct. 1956 (1991); *Wilson* v. *Firestone Tire & Rubber Co.*, 932 F.2d 510, 516 (6th Cir. 1991); *Lockary* v. *Kayfetz*, 917 F.2d 1150, 1157 (9th Cir. 1990); *Cunico* v. *Pueblo School District*, 917 F.2d 431, 444 (10th Cir. 1990); *Durango Associates, Inc.* v. *Reflange, Inc.*, 912 F.2d 1423, 1425 (Fed. Cir. 1990); *Roberts* v. *College of the Desert*, 870 F.2d 1411, 1418 (9th Cir. 1988); *Brandt* v. *Schal Associates, Inc.*, 854 F.2d 948, 954 (7th Cir. 1988); *Weinar* v. *Rollform Inc.*, 744 F.2d 797, 804 (Fed Cir. 1984) *cert. denied* 470 U.S. 1084, 85 L.Ed.2d 143, 143 S.Ct. 1844 (1985); *Averitt* v. *Southland Motors Inn of Oklahoma*, 720 F.2d 1178, 1180 (10th Cir. 1983); *Pitney Bowes, Inc.* v. *Mestre*, 701 F.2d 1365, 1374 (4th Cir. 1983), *cert. denied* 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983); *C.A. May Marine Supply Company* v. *Brunswick Corporation*, 649 F.2d 1049, 1056 (5th Cir. 1981) *cert. denied* 454 U.S. 1125, 102 S.Ct. 974, 71 L.Ed.2d 112 (1981); *Brookens* v. *White*, 795 F.2d 178, 180 (D.C. Cir. 1980); *Dreyton* v. *Jiffee Chemical Corp.*, 591 F.2d 352, 361, n.10 (6th Cir. 1978); *Elfman Motors, Inc.* v. *Chrysler Corp.*, 567 F.2d 1252, 1254 (3rd Cir. 1977); *Bach* v. *Coughlin*, 508 F.2d 303, 306 (7th Cir. 1974).

This conclusion is particularly appropriate where, as here, the parts of the judgment are truly independent. 9 J. Moore & B. Ward *Moore's Federal Practice* § 203.17[2] at 3-84 (2d Ed. 1993); *see also*, *C.A. May Marine Supply Co.* v. *Brunswick Corporation*, 649 F.2d at 1056.

Reinstatement of the Dismissed Cause of Action, filed in the District Court on December 27, 1991, Respondent states that the November 27, 1991 appeal "did not seek the review of this court's dismissal of the federal securities claims . . ." *See* App. A-49. Finally, on page 4 of its brief to the Court of Appeals, Respondent once again admits that it "did not seek review of the District Court's dismissal of the federal securities claims . . ."

Given the above, and applying the most liberal construction of Fed. R. App. p. 3(c), the conclusion is forced: Respondent failed to appeal the dismissal of the federal securities claims, including those based on §10(b). This is not a technicality, for the notice of appeal was not technically defective; it is the result of Respondent's unambiguous intention to exclude these issues from its appeal.

Fed. R. App. P. 4 establishes that an appeal in civil cases is taken by filing the notice of appeal required by Fed. R. App. p. 3 within 30 days after the day of the entry of the judgment. Because of the mandatory and jurisdictional nature of the time prescribed in F. R. App. P. 4, the judgment on the federal securities claims became final and unreviewable on November 30, 1991, 30 days after the entry of the judgment dismissing these claims. *See Smith* v. *Barry*, 112 S.Ct. at 682; *Torres* v. *Oakland Scavenger Co.*, 487 U.S. at 315; *Budinich* v. *Becton Dickinson and Co.*, 486 U.S. 196, 203 (1988); *Griffith* v. *Kentucky*, 479 U.S. 314, 321, n.6 (1987) (a case is final when the availability of appeal has been exhausted). Thus, contrary to the opinion of the Court of Appeals, at the time Section 27A was signed into law, December 19, 1991, there was a final and unreviewable judgment dismissing all the federal securities claims, including those brought under §10b.

Accordingly, the reinstatement of the §10b cause of action in this case violates the doctrine of separation of powers as well as the vested rights doctrine. *See* pages 10-15, *supra*.

B. *The Court of Appeals' Reliance on* Anixter *v.* Home-Stake Production Co., *is misplaced.*

The second ground used by the First Circuit to reject petitioner's constitutional arguments was "the reasons persuasively stated in *Anixter* v. *Home-Stake Production Co.*". *Cooperativa de Ahorro y Credito Aguada* v. *Kidder Peabody & Co.*, 993 F.2d at 273, App. A-7. Reliance on *Anixter* is misplaced, for the federal securities claim in that case was on appeal and therefore, pending when Section 27A was enacted. Thus, the analysis in that case is relevant only to the constitutionality of Section 27A as it applies to pending cases. This case, however, attacks the constitutionality of Section 27A(b) when applied to final cases. As discussed earlier, there is a material difference when a statute is applied retroactively to pending cases and when it is applied to cases whose judgments are final and unappealable. The former is generally a valid exercise of Congressional legislative powers, while the latter involved more serious separation of powers and due process concerns.

The factual situation of the case at bar is the same as in *Plaut* and *Pacific Mutual* where Section 27A(b) was used by the plaintiffs to attempt to reinstate §10b causes of action whose dismissal as time barred was final when Section 27A was enacted. As stated above, *see* pages 10-15, inasmuch as Section 27A(b) authorizes the reinstatement of said causes of action, it violates the doctrine of separation of powers as well as the vested rights doctrine.

CONCLUSION

WHEREFORE, for the foregoing reasons Petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Dated: October 8, 1993

APPENDIX A

United States Court of Appeals
For the First Circuit

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
PLAINTIFF, APPELLANT,

v.

KIDDER, PEABODY & CO., ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. JOSE ANTONIO FUSTE, *U.S. District Judge*

Before
SELYA, CYR, and STAHL,
Circuit Judges.

Enrique Peral, with whom *Edgardo L. Rivera*, *Roberto Boneta*, and *Munoz Boneta Gonzalez Arbona Benitez & Peral*, were on brief for appellant.

Nestor M. Mendez-Gomez, with whom *Patricia Rivera-MacMurray* and *Pietrantoni Mendez & Alvarez*, were on brief for appellee Kidder, Peabody & Co., *Gladys Isabel Flores* for appellee Ramon Almonte, and *Guillermo J. Bobonia* and *Carlos A. Bobonis* on brief for appellee Paine Webber Incorporated.

May 19, 1993

STAHL, *Circuit Judge*. In this appeal, we must decide whether the district court properly applied Fed. R. Civ. P. 12(b) in dismissing plaintiff's complaint as time barred.

Because the district court improperly relied on materials not within the pleadings in reaching its decision, we reverse the dismissal.

I.

FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

For purposes of this appeal, we provide only a summary of the procedural history of this case.[1] Plaintiff-appellant Cooperativa de Ahorro y Credito Aguada ("the Coop") is a single-branch savings and loan cooperative located in Aguada, Puerto Rico. On December 28, 1989, more than three years after purchasing shares in Drexel Burnham Lambert Unit Trust Bond Funds (hereinafter "Unit Trusts"), the Coop brought Section 10(b)[2] and Rule 10b-5[3] claims against its finan-

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[1] For more detailed accounts of the case, *see Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 758 F.Supp. 64 (D.P.R. 1990) (hereinafter *"Cooperativa I"*); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 777 F.Supp. 153 (D.P.R. 1990) (hereinafter *"Cooperativa II"*); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 799 F.Supp. 261 (D.P.R. 1990) (hereinafter *"Cooperativa III"*).

[2] Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), states in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ... [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[3] Rule 10b-5, 17 C.F.R. § 240.10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the state-

cial services brokers, defendants-appellees Kidder, Peabody & Co. ("Kidder") and Ramon Almonte.[4] The complaint alleged that Almonte, while employed at Kidder, had fraudulently induced the Coop to purchase shares in the Unit Trusts by misrepresenting to the Coop the nature and risk of these investments. As to timeliness, the complaint alleged that, because Almonte had continued to misrepresent the nature and value of the Unit Trusts from the date of purchase through July of 1989, the applicable Puerto Rico two-year statute of limitations had tolled.[5]

While the Coop's claims were pending before the district court, the United States Supreme Court announced a uniform federal statute of limitations for all Section 10(b) and Rule 10b-5 claims in *Lampf, Pleva, Lipkind, Prupis & Petigrow*

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ments made, in the light of the circumstances under which they are made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

in connection with the purchase or sale of any security.

[4] The complaint also named Almonte's subsequent employer, Paine Webber, Inc., ("Paine Webber"), as a defendant, and alleged other securities, RICO, and mail fraud claims against Almonte, Kidder and Paine Webber. These additional federal claims were dismissed by the district court and are not before us on this appeal. *See Cooperativa I*, 758 F.Supp. at 64; *Cooperativa II*, 777 F.Supp. at 157-61.

In addition, the complaint included state law fraud claims against all three defendants. These claims were dismissed for want of pendent jurisdiction coincident with the dismissal of the federal securities claims. *See Cooperativa II*, 777 F.Supp. at 161. While our decision in the instant appeal will result in the reinstatement of those claims as well, we reinstate them without prejudice to the district court's further consideration of whether or not it should hear and determine them under pendent and/or supplemental jurisdiction.

[5] The parties do not dispute that at the time the Coop filed suit, the applicable statute of limitations was the two-year provision "borrowed" from the Puerto Rico Securities Act, 10 L.P.R.A. § 890(e). This two-year limitation was subject to equitable tolling under the doctrine of fraudulent concealment, which provides that "the statute of limitations applicable to claims under Section 10(b) and Rule 10b-5 begins to run when an investor, in the exercise of reasonable diligence, discovered or should have discovered the alleged fraud." *General Builders Supply Co.* v. *River Hill Coal Venture*, 796 F.2d 8, 11 (1st Cir. 1986).

v. *Gilbertson*, 111 S.Ct. 2773 (1991). *Lampf* held that such claims must be brought within one year of discovery of the facts which give rise to the violation, and no more than three years after the violation itself. *Id.* at 2781-82. The one-and-three year limitation announced in *Lampf* is not subject to tolling. *Id.* at 2782. Because the Coop's claims had been filed more than three years after the purchase of the Unit Trusts, the district court, relying on *Lampf*, dismissed the claims (hereinafter "the first dismissal"). *Cooperativa II*, 777 F.Supp. at 155-56.

Less than two months after the first dismissal, the Coop's claims were reinstated by Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2387 (codified as § 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1) (hereinafter "Section 27A").[6] Section 27A reinstates claims which, like the Coop's, were (1) pending at the time *Lampf* was decided, and (2) dismissed as time barred under *Lampf*. Pursuant to Section 27A, the Coop filed a timely motion for reinstatement.

With the Coop's claims before it a second time, the district court set out to apply the pre-*Lampf* statute of limitations, which, as noted above, was subject to tolling. Having no dis-

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[6] Section 27A provides:

> **(a) Effect on pending causes of action**
>
> The limitation period for any private civil action implied under [section 10(b)] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> **(b) Effect on dismissed causes of action**
>
> Any private civil cause of action implied under [section 10(b)] that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

covery before it on the issues of timeliness and tolling, the district court applied Fed. R. Civ. P. 12(b)[7] to the Coop's motion for reinstatement.

The district court began its application of Rule 12(b) with a brief analysis of the junk bond market. Relying extensively on articles in the national press, submitted by neither party, the district court found that "it was public common knowledge within institutional investment circles that . . . the high yield bonds sold by Drexel were accompanied by an equally high risk," *Cooperativa III*, 799 F.Supp. at 264, and that "any reasonabl[y] sophisticated institutional investor should have recognized that it was investing in junk bonds."[8] *Id.* at 266. The district court concluded that the Coop "was under an obligation to conduct a reasonably diligent inquiry from the date of purchase of [the Unit Trusts] and so the statute of limitations began to run on that date." *Id.*

As an alternative date for commencing the running of the statute of limitations, the district court found that the stock market crash of October 19, 1987, was sufficient to put the Coop on notice of its possible securities claims against defendants. *Id.* at 265-66. Again, the court relied on national press

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[7] Defendants argue that the district court applied Rule 60(b) to the motion for reinstatement. Though the district court did refer to the motion as a "Fed. R. Civ. P. 60(b) motion for reconsideration," *Cooperativa III*, 799 F.Supp. at 262, it went on to apply a Rule 12(b) standard, "[l]ooking at the facts in a light most favorable to [the Coop] and taking them as true, Fed. R. Civ. P. 12(b)(6)." *Id.* at 264.

Nothing in the language of Section 27A or in its legislative history suggests that district courts should apply Rule 60(b) to motions for reinstatement thereunder. Rather, Section 27A states that claims meeting its requirements "*shall be reinstated* on motion by the plaintiff" (emphasis supplied). The district court properly chose to apply a Rule 12(b) standard to the Coop's motion for reinstatement, and we reject defendant's argument that the court applied or should have applied Rule 60(b).

[8] The district court relied upon articles from, *inter alia*, *The Christian Science Monitor*, *Barrons*, *Forbes*, *Business Week*, *Fortune*, and *The Los Angeles Times*. *Cooperativa III*, 799 F.Supp. at 264 nn. 5, 6.

reports submitted by neither party to support its view that such notice was within the realm of common knowledge.[9]

Applying either date, the district court found that the Coop's December 28, 1989, complaint failed to state a timely claim under Puerto Rico's two-year statute of limitations. Accordingly, it dismissed the Coop's claims a second time (hereinafter "the second dismissal"). *Id.*

The Coop now appeals the second dismissal, arguing that the district court's reliance on materials outside of the pleadings was improper and thus not a valid basis for dismissing its claim. For the reasons that follow, we agree.

II.

DISCUSSION

Under Rule 12(b), "any consideration of documents not attached to the complaint, or not expressly incorporated therein, is forbidden, unless the proceeding is properly converted into one for summary judgment under [Fed. R. Civ. P.] 56." *Watterson* v. *Page*, 987 F.2d 1, 3 (1st Cir. 1993). *See also* Fed. R. Civ. P. 12(b) (if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56"). Moreover, upon conversion to summary judgment, "all parties shall be given a reasonable opportunity to present all material made pertinent" by the conversion. Fed. R. Civ. P. 12(b). *See also Whiting* v. *Maiolini*, 921 F.2d 5, 6 (1st Cir. 1990).

Here, the district court relied extensively on materials outside the pleadings in reaching its conclusion as to when the statute of limitations began to run on the Coop's claims. In relying on these extraneous materials, the district court gave the parties neither notice nor opportunity to be heard, nor

[9] Here, the district court relied on articles from *The Financial Times*, *Reuters*, *The New York Times*, and *The Washington Post*. *Cooperativa III*, 799 F.Supp. at 265-66 nn. 10, 12.

did it convert the proceeding to one for summary judgment. Such use of outside materials is beyond the scope of Rule 12(b).

Nor do we find that the district court's reliance on such material was within the scope of "judicial notice" under Fed. R. Evid. 201(b).[10] Ordinarily, when a district court takes judicial notice of a fact other than at the request of a party, it should notify the parties that it is doing so and afford them an opportunity to be heard. *United States* v. *Garcia*, 672 F.2d 1349, 1356 n.9 (11th Cir. 1982). *See also Barr Rubber Prods. Co.* v. *Sun Rubber Co.*, 425 F.2d 1114, 1125-26 (2d Cir.) (stating that failure to notify parties "exceeded the bounds of judicial notice, and thereby denied [party] an effective opportunity to object [to], examine and rebut the matters noticed") (footnote omitted), *cert. denied*, 400 U.S. 878 (1970); 21 Charles A. Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5107 (1977) ("[T]he judge must notify the parties that [s/]he is taking judicial notice of an adjudicative fact.") (footnote omitted). As noted above, the district court gave the parties no such opportunity to be heard. Accordingly, we find that the district court's use of scattered press reports to take judicial notice of an adjudicative fact was beyond the proper scope of judicial notice.

Finally, defendants offer an alternative ground for affirming the district court's dismissal of the Coop's claims, claiming that Section 27A is constitutionally infirm. For the reasons persuasively stated in *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533, 1543-47 (10th Cir. 1992), *cert. denied*, No. 92-1099, 1992 WL 391280 (Apr. 19, 1993), we reject

[10] Fed. R. Evid. 201(b) provides:

> A judicially noted fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

defendants' constitutional challenges to Section 27A.[11] *See also Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1571-75 (11th Cir. 1992); *Berning* v. *United States*, No. 91-3318, 1993 WL 84590, **5-7 (7th Cir. March 25, 1993).

III.

CONCLUSION

For the foregoing reasons, the order of the district court denying the Coop's motion for reinstatement under Section 27A is reversed. *Reversed and remanded.*

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[11] "Given the existence of a cogent, well-reasoned, eminently correct opinion closely on point, we embrace it." *United States* v. *29 Cartons*, 987 F.2d 33, 37 (1st Cir. 1993). Beyond *Anixter*, we add only the following comment in order to address defendants' argument that Section 27A unconstitutionally deprived them of a vested property right. It is well established that a party's property right in a cause of action does not vest "until a final, unreviewable judgment has been obtained." *Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986). *See also Hoffman* v. *City of Warwick*, 909 F.2d 608, 621 (1st Cir. 1990). At the time that Section 27A was signed into law, no final judgment had been entered in the instant case. Accordingly, defendants' argument that Section 27A deprived them of a vested property right is without merit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2148

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
PLAINTIFF, APPELLANT,

v.

KIDDER, PEABODY & CO., ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered: May 19, 1993

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The order of the district court denying the motion of Cooperativa De Ahorro y Credito Aguada for reinstatement under Section 27A is reversed and the cause is remanded to the district court in accordance with the opinion issued this date.

By The Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs: Peral and Mendez-Gomez]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civil No. 89-1706 (JAF)

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
PLAINTIFF,
v.
KIDDER, PEABODY & CO.; PAINE WEBBER INCORPORATED; RAMON M. ALMONTE, JANE DOE, AND THE PROPERTY PARTNERSHIP EXISTING BETWEEN THEM,
DEFENDANTS.

OPINION AND ORDER

We have before us plaintiff's Fed. R. Civ. P. 60(b)(6) motion for reconsideration of this court's decision of October 31, 1991. *See Cooperativa de Ahorro* v. *Kidder Peabody & Co.*, 777 F.Supp. 153 (D.P.R. 1991). There, we found plaintiff's securities law claims time-barred.

The motion for reconsideration makes reference to the recent passage of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("the Act"). Pub. L. No. 102-242, 105 Stat. 2236 (1991). Section 476 of the Act, 105 Stat. at 2387, amends section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and overturns the retroactive effect of the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, ____ U.S. ____, 111 S.Ct. 2773 (1991).[1] Plaintiff claims that if we apply section 476 of the Act and Puerto Rico law, the securities claims are not

[1] The *Lampf* decision, which established a federal statute of limitations for section 10(b) actions, 15 U.S.C. § 78j, was given retroactive effect by a companion case, *James B. Beam Distilling Company & Georgia*, ____ U.S. ____, 111 S.Ct. 2439 (1991).

time-barred. Defendants claim that section 476 is unconstitutional and, therefore, the court should follow its original decision under *Lampf*.

We now decide that under section 476 of the Act and Puerto Rico law, the securities claims are time-barred. We do not reach the constitutional argument.[2]

Section 476

In section 476, Congress established that:

> [a]ny private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991
>
> —
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and

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[2] The courts which have found section 476 to be constitutional include: *In re American Continental Corporation*, 140 F.R.D. 425 (D.C. Az. 1992); *Adler* v. *Berg Harmon Associates*, 790 F.Supp. 1235 (S.D.N.Y. 1992); *Brown* v. *Hutton Group*, No. 89 CIV 611 (WCC), 1992 U.S. Dist. LEXIS 5818 (S.D.N.Y. April 27, 1992); *Axel Johnson, Inc.* v. *Arthur Andersen & Co.*, 790 F.Supp. 476 (S.D.N.Y. 1992); *In re Melridge, Inc.*, No. 87-1426-JU, 1992 U.S. Dist. LEXIS 3477 (D. Or. March 20, 1992); *TBG, Inc.* v. *Bendis*, No. 89-2433-0, 1992 U.S. Dist. LEXIS 5940 (D. Kansas March 5, 1992); *Venturtech II* v. *Deloitte Haskins & Sells*, 790 F.Supp. 574 (E.D.N.C. 1992); *Ayers* v. *Sutliffe*, No. C-1-90-650, 1992 U.S. Dist. LEXIS 3219 (S.D. Ohio Feb. 11, 1992); *Bankard* v. *First Carolina Communications, Inc.*, No. 89-8571, 1992 U.S. Dist. LEXIS 53 (N.D. Ill. Jan. 3, 1992).

Those which have found section 476 to be unconstitutional include: *TGX Corp.* v. *Gaylor Simmons*, 786 F.Supp. 587 (E.D. La. 1992); *Bank of Denver* v. *Southeastern Capital Group, Inc.*, 770 F.Supp. 595 (D. Col. 1992); *Pacific Mutual* v. *First Republic Bank Corporation*, No. 3:91-CV-0441-H, 1992 U.S. Dist. LEXIS 10530 (N.D. Tx. July 13, 1992); *Treiber* v. *Katz*, No. 91-CV-70374-DT, 1992 U.S. Dist. LEXIS 8364 (E.D. Mich. June 5, 1992); *Duldue* v. *Cigna Securities, Inc.*, No. 90-CV-72191 (E.D. Mich. filed May 15, 1992); *Plaut* v. *Spendthrift Farm, Inc.*, No. 87-438 (E.D. Ky. filed April 13, 1992); *Johnston* v. *Cigna Corporation*, 789 F.Supp. 1098 (D. Col. 1992); *In re Brichard Securities Litigation*, 788 F.Supp. 1098 (N.D. Cal. 1992); *Mancino* v. *International Technology Corp.*, No. 89-7244-RMT(Sx), 1992 U.S. Dist. LEXIS 5039 (C.D. Cal. March 11, 1992).

> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

We first consider if plaintiff's action satisfies the requirements or section 476. Plaintiff's action must fulfill four criteria: (1) it must have been filed before June 19, 1991; (2) it must have been dismissed after June 19, 1991; (3) it would have been timely filed under the pre-*Lampf* statute of limitations period; and (4) the plaintiff's motion for reconsideration must have been filed within sixty days of December 19, 1992. The plaintiff's action fulfills three of the requirements: it was filed on December 28, 1989, dismissed on October 31, 1991, and the motion for reconsideration was brought within sixty days on December 27, 1991. The determination that follows is whether the action "would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction."

Timely Filing

This court first stayed the progress of the instant case in anticipation of the imminent resolution by the Supreme Court of the split which had developed between circuits which had adopted an analogous federal statute of limitations and those retaining the traditional practice of adopting a state statute of limitations for section 10(b) actions. *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 758 F.Supp. 64, 70-71 (D.P.R. 1991). Through the enactment of section 476, Congress required courts to apply "the laws applicable in the jurisdiction" where the court sits to cases arising before the decision in *Lampf* was handed down on June 19, 1991. We find that the law applicable in our jurisdiction before June 19, 1991 was the two-year statute of limitations contained in

the Puerto Rico Securities Act, 10 L.P.R.A. § 890(e).[3] Therefore, because the last sale of securities occurred on December 16, 1986, *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 758 F.Supp. 64, 72 (D.P.R. 1991), plaintiff's suit, which was filed on December 28, 1989, is time-barred unless the statute of limitations was tolled.[4]

The First Circuit has adopted the federal doctrine of fraudulent concealment, which acts to toll a statute of limitations where there has been fraud. *Cook* v. *Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978). The last sale in this case occurred more than three years prior to the filing of the action. This exceeds the two-year statute of limitations discussed above. Under the doctrine of fraudulent concealment, the statute of limitations begins to run when "an investor, in the exercise of reasonable diligence, discovered or should have discovered the alleged fraud." *General Builders Supply Co.* v. *River Hill Coal Venture*, 796 F.2d 8, 11 (1st Cir. 1986). "The doctrine of fraudulent concealment operates to toll the statute of limitations 'where the party injured by the fraud remains in ignorance of it *without any fault or want of diligence or care on his part* . . . until the fraud is discovered,

[3] Prior to June 19, 1991, the First Circuit had shown no indication that it was considering the rather radical step of adopting a federal limitations period for section 10(b) actions. Indeed, several recent district court opinions suggest that the rule of adopting state statutes of limitations was very much alive in the First Circuit before *Lampf. Slavin* v. *Morgan Stanley & Co., Inc.*, 791 F.Supp. 327 (D. Mass. 1992); *Alton* v. *Prudential-Bache Secur., Inc.*, 753 F.Supp. 39, 41 (D. Mass. 1990).

[4] We now find that the two-year statute of limitations is a civil law caducity period ("plazo de caducidad"). The lapse of time extinguishes the cause of action. *Martinez* v. *Calzadilla*, 756 F.Supp. 78, 81-82 (D.P.R. 1991); *Arrieta Gimenez* v. *Arrieta Negron*, 672 F.Supp. 46, 48-50 (D.P.R. 1987); *Fireman's Insurance Co. of Newark* v. *Gulf-Puerto Rico Lines*, 349 F.Supp. 952, 957 (D.P.R. 1972); *R.D. Farnsworth* v. *CRUV*, 289 F.Supp. 666 (D.P.R. 1968). Notwithstanding the fact that we are facing a caducity term, we have considered the doctrine of fraudulent concealment adopted by the First Circuit only to find that even if a fraudulent concealment defense would be available in reference to a caducity term, plaintiffs knew or should have known of the problems affecting the junk bond market and more than two years elapsed between knowledge and the filing of the complaint.

though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" *Cook* v. *Avien, Inc.*, 573 F.2d at 694. The requirement of diligence was defined by the First Circuit in *General Builders Supply Co.* as demanding that "[a]n investor must also 'apply his common sense to the facts that are given him' to determining whether further investigation is needed." *General Builders Supply Co.* v. *River Hill Coal Venture*, 796 F.2d at 13 (quoting *Cook* v. *Avien, Inc.*, 573 F.2d at 696 n.24). Within this framework, a complaint is timely filed if it is filed within two years of the date on which a reasonable investor has sufficient hints of fraud to prompt him to make a reasonably diligent inquiry.

To properly discuss the application of the doctrine of fraudulent concealment to the facts of this case we must first sketch out a short history of the junk bond market and highlight the role of plaintiff, Cooperativa de Ahorro y Credito Aguada ("the Cooperativa"), in the purchase of the bonds. "Junk bond" is the term used to describe high yield debt securities with a credit rating that is lower than investment grade. In its 1980's manifestation, this investment instrument was developed by Drexel Burnham Lambert ("Drexel") in the person of Michael Milken.[5] As noted in our earlier opinion, the Cooperativa was a single branch savings and loan institution, operated by a Board of Directors and an Administrator. The Cooperativa's assistant manager was the individual who negotiated the purchase of the bonds from defendant Almonte. There is no claim that the assistant manager failed to follow the institution's procedures for investment decisions. The Cooperativa is a sophisticated institutional investor, not an ignorant investor. The Cooperativa claims that it sought unspeculative investments that provided a safe, moderate rate of return. Its claim in this case is that defendant Almonte

[5] Scott, *Junk Bonds Offer More Flavor than the Plain Vanilla Kind*, CHRISTIAN SCIENCE MONITOR, May 17, 1985 at B8 ("Drexel's rise to prominence as the preeminent junk bond dealer is predicated on Michael Milken's championing of these securities.").

led these sophisticated investors to believe that the Drexel Burnham Lambert Unit Trusts were safe and unspeculative. Looking at the facts in the light most favorable to plaintiff, and taking them as true, Fed. R. Civ. P. 12(b)(6), we find that in light of the massive public information that was available concerning the sponsoring by Drexel Burnham Lambert of these investment instruments called "junk bonds", the plaintiff, as a normally sophisticated institutional investor, had ample warning which would trigger a common-sense investigation and assessment of its investment.

At the time during which plaintiff bought its Drexel bonds, it was public common knowledge within institutional investment circles that, although gaining in respectability, the high yield bonds sold by Drexel were accompanied by an equally high risk, and were growing riskier as the volume of bonds issued grew.[6] Knowledge of the risks was generally advised before investment: Mr. Dow, of the Dow Jones Stock Exchange, advised "'First, do your homework.'" Scott, *Junk Bonds have more Flavor than the Vanilla Kind*, CHRISTIAN SCIENCE MONITOR, May 17, 1985 at B8. Before the market crash of 1987, there were various congressional attempts to legislate and regulate limits on the investment in and use of junk bonds.[7] Although there were different schools of thought

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[6] Forsyth, *Heading for the Scrap Heap? Why Junk Bonds are Growing Riskier*, BARRONS, April 29, 1985 at 34; McGough, *Reaching for Yield*, FORBES, Sept. 16, 1985 at 91 ("But junk bond funds, unlike money market funds, bear substantial credit risks."); Bianco, *The Growing Respectability of the Junk Heap*, BUSINESS WEEK, April 22, 1985 at 66 ("Meanwhile, two recent academic studies are helping give new respectability to low-rated issues. The evidence indicates that junk bonds are more likely to default than are high-grade bonds. But up to now, junk bond investors have been handsomely — even excessively — compensated for the added risk."); Hector, *A Go-Go Insurer Adds Zest to Life*, FORTUNE, March 5, 1984 at 51 ("He is betting heavily on risky B- and BB-rated bonds — junk bonds, as Wall Street calls them."); Furlong, *Columbia S&L Thrives on Taking Risks*, LOS ANGELES TIMES, Oct. 20, 1985 at pt. 2 pg. 1 ("Spiegel doesn't dispute that junk bonds are risky; he merely says that the risk is worth the reward.").

[7] *Junk Bond Guidelines Set*, NATIONAL MORTGAGE NEWS, April 13, 1987 at 1 (Federal Home Loan Bank Board issued guidelines which warned thrifts

concerning the advisability of investing in junk bonds all were in agreement that it was an investment accompanied by a high degree of risk.[8] Supporters of junk bond investment argued that sophisticated investors should be allowed the option of assuming a higher risk for the reward of a comparably higher yield.[9] Trouble in this risky junk bond market culminated with the market crash of October 19, 1987, which sent investors running to unload their junk bond investments.[10]

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of risks inherent in junk bonds); Scott, *Junk Bonds have more Flavor than the Vanilla Kind*, CHRISTIAN SCIENCE MONITOR, May 17, 1985 at B8 ("[T]here is concern the savings-and-loans are developing an unhealthy appetite for these risky bonds. So Congress and state legislators are contemplating steps to curb junk bond financing."); Albert, *Fed Draws Fire for Expected Junk Bond Rule*, AMERICAN BANKER, Dec. 6, 1985 at 1 ("Earlier this week, the Fed was said to be planning to impose margin, or credit, requirements on certain junk bonds.").

[8] Greene, *What, and whose, bottom line?* FORBES, Oct. 7, 1987 at 101 ("But despite the fact that junk bonds are every bit as risky as common stock, they are not considered equity, and the commitment junk bond holders make to a company's capital structure isn't considered in earnings per share."); Horowitz, *Salomon Moves to Bigger Role in Merchant Banking*, AMERICAN BANKER, April 30, 1987 at 3 ("Salomon has had a reputation of shying away from some of the riskier new areas, and its chief economist, Henry Kaufman, has publicly issued warnings about the economic dangers of junk bond financing.").

[9] Carney, *Examine the Motives of Junk-Bond Critics*, BUSINESS WEEK, March 30, 1987 at 18 (states that investors in junk bonds are not "widows and orphans but some of the country's most sophisticated financial institutions. They have been amply compensated for taking on the additional risk of junk bonds."); Updegrave, *Smart Ways to Invest in a Risky Market*, MONEY, October 1987 at 44 ("If you want to risk buying junk bonds to get a higher yield, select a diversified junk bond fund rather than the bonds of individual companies — and be prepared to switch out of the fund at the first signs of economic downturn."); *Junk Bonds*, THE WASHINGTON POST, April 11, 1985 at A20 ("But since the junk bonds bear low ratings, sophisticated investors presumably have been warned adequately of their risk and are prepared to assume it.").

[10] Buchan, *Financial Markets in Turmoil; Investors Wince as Junk Bonds Follow Equities' Descent*, FINANCIAL TIMES, October 27, 1987 at sec. I pg. 2 ("In the process, junk bonds have been revealed for what some analysts always said they were; securities with all the risk of stocks and none of the rewards."); *U.S. Corporate Financing Pace seen Slowing*, REUTERS, Oct. 20, 1987 ("Investors sold junk bonds amid worries that a possible recession could lead to defaults among some highly leveraged issuers, analysts said.");

The view that junk bonds were a questionable investment and a bad overall financial strategy appeared to have been amply confirmed well before the market crash. Then came the implication of the involvement of Drexel in insider trading scandals.[11] All this caused the market for junk bonds to become very unstable. After this the market for junk bonds stabilized once more only to once again collapse in late 1988 when the value of all junk bond investments, including plaintiff's, began to drop rapidly. This culminated in the forced sale of plaintiff's investment in July of 1989 at a significant loss.

Clearly the junk bond market was designed for only the most sophisticated investors, although one of the concerns that developed was that so many relatively unsophisticated investors bought junk bonds. Plaintiff, as an institutional investor belonged to that group of sophisticated investors. Obviously, plaintiff bought Drexel bonds between June and December of 1986 because of the attractive yields. Regardless of what it was told by Almonte before the sale, any reasonable sophisticated institutional investor should have recognized that it was investing in junk bonds.[12] If plaintiff bought $3.5 Million worth of Drexel bonds without determining their market rating and simply accepted Almonte's allegedly misleading representations that these were normal investments,

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Quint, *Tide is Out for Risky Debt*, NEW YORK TIMES, November 12, 1987 at D1 ("they generally agreed that its problems were compounded by the generally negative conditions for the entire market of high-yielding, high-risk issues known as junk bonds.").

[11] Wayne, *Latest Corporate Takeovers Involve more than Just Paper*, THE NEW YORK TIMES, March 15, 1987 at sec. 4 pg. 26 ("The insider trading scandal, at first, had decimated the junk bond market, which has rebounded for nearly everything but high-risk hostile takeovers."); Ungeheuer, *Back in the Spotlight; As Boesky faces Sentencing, the Insider-trading Probe Rolls On*, TIME, December 21, 1987 at 55.

[12] Auletta, *Boesky's World; It's not just a Few Bad Apples — The Whole Barrel is Rotten*, THE WASHINGTON POST, November 23, 1986 at D1 ("To keep pace with Drexel's near stranglehold on junk-bond financing, investment banks now rush to even more speculative ventures.").

then Cooperativa did not apply the common sense approach required by the doctrine of fraudulent concealment.

"An investor must 'apply his common sense to the facts that are given him' to determine whether further investigation is needed," so runs the language adopted by the First Circuit. *General Builders Supply Co.* v. *River Hill Coal Venture*, 796 F.2d at 13. Common sense would dictate that an investment of $3.5 Million in what is generally regarded as a risky investment would require thorough investigation and constant monitoring. Any reasonable investor would have been on notice by the very nature of the investment and common sense required to do more than simply accept the representations of a broker.

We do not reach the question of whether the actions of plaintiff's broker, Almonte, constituted securities fraud within the meaning of section 10(b) of the Securities and Exchange Act. What we find is that plaintiff was under an obligation to conduct a reasonably diligent inquiry from the date of purchase of junk bonds and so the statute of limitations began to run on that date. If the statute of limitations began to run on December 16, 1986, the date of the last purchase, an action filed on December 28, 1989 is untimely. Even if one assumes for argument purposes that the general opinion in the financial community concerning junk bonds was not enough of a "storm warning," we would certainly find that the market crash of October 19, 1987 and the subsequent shake-up of the junk bond market gave Cooperativa adequate warning to the effect that the financial instruments in which they invested were not the stable investments they had been represented to be. Once again, more than two years elapsed and nothing was done.

Conclusion

The motion for reconsideration is DENIED. The securities claims are also time-barred under section 476 of the Act and Puerto Rico law.

IT IS SO ORDERED.

San Juan, Puerto Rio, this 4th day of September, 1992.

/s/ JOSE ANTONIO FUSTE
JOSE ANTONIO FUSTE
U.S. District Judge

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 92-2148

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
PLAINTIFF-APPELLANT,

v.

KIDDER, PEABODY & CO., ET AL.,
DEFENDANTS-APPELLEES.

Before Breyer, Chief Judge,
*, Selya, Cyr, Boudin and Stahl,
Circuit Judges.

ORDER OF COURT

Entered: June 23, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judge of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

* Judge Juan R. Torruella has recused himself.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

/s/ Francis P. Scigliano
Clerk

PMA
JUN 28 1993
RECEIVED

[cc: Messrs. Peral and Mendez-Gomez]

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 92-2148

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
PLAINTIFF-APPELLANT,

v.

KIDDER, PEABODY & CO.; PAINE WEBBER INCORPORATED; RAMON M. ALMONTE, MAYLEEN GRATACOS AND THE PROPERTY PARTNERSHIP EXISTING BETWEEN THEM,
DEFENDANTS-APPELLEES.

MOTION FOR EXTENSION OF TIME

COMES NOW Defendant-Appellee Kidder, Peabody & Co. ("Kidder"), through the undersigned attorneys and very respectfully states and prays:

1. On May 19, 1993, a panel of this Court issued an opinion in this case. The request for Petition for Rehearing and Suggestion for Rehearing en banc is, therefore, due on June 4, 1993.

2. The undersigned counsel has been recently retained by Appellee to prepare the Petition for Rehearing and Suggestion for Rehearing en banc. Because of the complex nature of the issues involved, the undersigned counsel will need an additional period of ten (10) days to complete and file the Petition.

WHEREFORE, Appellee respectfully requests an extension of ten (10) days, that is, until June 12, 1993, to file said Petition for Rehearing and Suggestion for Rehearing en banc.

RESPECTFULLY SUBMITTED.
In San Juan, Puerto Rico, this 27th day of May, 1993.

JORGE E. PEREZ DIAZ, ESQ.
Box 1746
Hato Rey, Puerto Rico 00919
Tel. (809) 274-1212

By: JORGE E. PEREZ DIAZ
JORGE E. PEREZ DIAZ

CERTIFICATE OF SERVICE

I hereby certify that on this same date two copies of the brief for Kidder, Peabody & Co. have been delivered by regular mail to Roberto Boneta, 208 Ponce de Leon Avenue, 1800 Popular Center, Hato Rey, Puerto Rico 00918-1009; Harry E. Woods, Woods & Woods, P.O. Box 3600, Hato Rey, Puerto Rico 00919; Nestor M. Mendez-Gomez, Esq., and Patricia Rivera-MacMurray, Pietrantoni Mendez & Alvarez, Suite 1420, 14th Floor, Banco Popular Center, 209 Munoz Rivera Avenue, Hato Rey, Puerto Rico 00917; and to Guillermo Bobonis, Bobonis, Bobonis & Rodriguez Poventud, 129 De Diego Avenue, Condado, Puerto Rico 00911-1927.

/s/ JORGE E. PEREZ DIAZ
JORGE E. PEREZ DIAZ

APPENDIX F

United States Court of Appeals
For the First Circuit

No. 92-2148

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
PLAINTIFF, APPELLANT,

v.

KIDDER, PEABODY & CO., ET AL.,
DEFENDANTS, APPELLEES.

ORDER OF COURT

Entered: June 1, 1993

Upon motion,

It is ordered that the time for appellee Kidder, Peabody & Co. to file a petition for rehearing with a suggestion for rehearing en banc be enlarged to and including June 14, 1993.

By The Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs: Peral, Mendez-Gomez and Perez Diaz]

APPENDIX G

United States Court of Appeals
For the First Circuit

No. 92-2148

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
PLAINTIFF-APPELLANT,

v.

KIDDER, PEABODY & CO., ET AL.,
DEFENDANTS-APPELLEES.

PETITION FOR REHEARING, WITH A SUGGESTION THAT THE CASE BE REHEARD EN BANC

TO THE HONORABLE COURT OF APPEALS:

Appellant, Kidder, Peabody & Co. (hereinafter "Kidder") respectfully prays for a rehearing of that part of this Court's decision of May 19, 1993, rejecting its argument that Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, codified as Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78 aa-1 (hereinafter "Section 27A") is unconstitutional because it deprives Kidder of a vested property right. *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co., et al*, slip op. at 10 (1st Cir. May 19, 1993). Kidder suggests that the case be reheard en banc.

Kidder submits that this Court should grant this petition for the following reasons. First, the panel's opinion that property rights in this case had not vested is premised in part on the erroneous determination that at the time Section 27A was signed into law no final and unreviewable judgment had

been entered regarding Plaintiff-Appellant Cooperativa de Ahorro y Credito Aguada's (hereinafter "Cooperativa") federal securities claims. Slip op. at 10. n.11. As argued fully below, by not appealing that part of the District Court's judgment of October 31, 1991, relating to the federal securities law claims, the dismissal of said claims became final and unreviewable on November 30, 1991. Accordingly, at the time Section 27A was signed into law, December 19, 1991, there was indeed a final unreviewable judgment on the federal securities law claims.[1]

The second basis for the panel's opinion was the constitutional analysis of Section 27A in *Anixter* v. *Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 123 L.Ed.2d 467, 113 S.Ct. 1841 (1993); *Henderson* v. *Scientific-Atlantia, Inc.*, 971 F.2d 1567 (11th Cir. 1992); and, *Berning* v. *United States*, 990 F.2d 272 (7th Cir. 1993). However, none of these cases involved a final, unreviewable judgment. Only *Anixter* mentioned the vested rights doctrine, and did so by relying on *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), which also did not involve a final unreviewable judgment. Indeed, *Chase*, supports Kidder's contention that final, unreviewable judgments, vest federal constitutional rights that Congress cannot constitutionally divest. Furthermore, *Anixter* relied on a conclusion in *Axel Johnson* v. *Arthur Andersen*, 790 F.Supp. 476, 483 (S.D.N.Y. 1992) which is contrary to the law in this Circuit that judgments dismissing claims on statutes of limitations grounds are judgments on the merits.

[1] It should be noted at the outset that ever since Cooperativa initiated its attempt to reinstate its claims under Section 27-A, Kidder has reiterated its argument that the judgement on the federal securities claim was final and unreviewable at the time the Act was passed and that, thus, it had a vested property right. See *e.g.*, Kidder's Opposition to Plaintiff's Motion for Reinstatement of Action at 2, 7-8, 9, 12-13, 14-22, Appendix Vol. II, p. 570, 572, 574-75, 577, 580-81, 582-591; *See also*, Brief for Appellee Kidder at 4, 5, 32, 40. Cooperativa, on the other hand, alleged for the first time that the order was not final in its reply brief in this Appeal. Reply Brief at 7.

I.

AT THE TIME SECTION 27A WAS SIGNED INTO LAW THERE WAS A FINAL, UNREVIEWABLE JUDGMENT DISMISSING PLAINTIFF'S FEDERAL SECURITIES LAW CLAIMS

The panel opinion correctly points out that "a party's property right in a cause of action does not vest 'until a final unreviewable judgment has been obtained'." Slip op. at 10, n.11 (*quoting Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986)); *see also*, *Hoffman* v. *City of Warwick*, 909 F.2d 608, 621 (1st Cir. 1986); *Arrieta Gimenez* v. *Arrieta Negron*, 859 F.2d 1033, 1038, n.2 (1st Cir. 1988). Yet, contrary to the panel's opinion, at the time Section 27A was enacted, there was indeed a final and unreviewable judgment dismissing *all* the federal securities claims against *all* defendants, including, of course, those claims under §10b which Section 27A purports to reinstate.

The complaint in this case alleged three broad categories of claims against Kidder and other codefendants, namely federal securities claims, RICO, and pendent local fraud claims. App. Vol. I, p. 1-20. On January 25, 1991, the District Court dismissed all RICO allegations as to Kidder and co-defendant Paine Webber, all but one RICO claim against co-defendant Almonte and all the federal securities claims against Paine Webber. App. Vol. II, p. 426-460. Partial Judgment was entered accordingly on January 29, 1991. App. Vol. II, p. 461-462.

On October 31, 1991, the District Court issued an opinion and order dismissing the remaining claims, App. Vol. II, p. 516-32, and on that same day entered the following judgment:

> "Pursuant to the terms of an Opinion and Order announced by the court today, judgment is now entered as follows:

> 1. The court now DISMISSES all federal securities law claims. Claims under section 10(b) of the 1934 Securities Act, Rule 10b-5, 15 U.S.C. § 78j(b), are time-barred according to *Lampf*, as are claims under section 17(a) of the 1933 Act, 15 U.S.C. § 780(c)(1)(2), are also time-barred under section 29(b) of the 1934 act, 15 U.S.C. § 78cc(b). Claims under section 20 of the 1934 Act, 15 U.S.C. § 78t, are dismissed for failure to state a cause of action.
>
> 2. This court also DISMISSES the remaining section 1962(c) claim against defendant Almonte for failing to state a cause of action.
>
> 3. This court declines to exercise pendent jurisdiction and DISMISSES without prejudice all local law fraud claims.
>
> Accordingly, judgment is hereby entered dismissing the complaint as to all defendants."

See Addendum 1.

Thereafter, on November 23, 1991, Cooperativa filed the following timely Notice of Appeal:

> "NOTICE is hereby given that the above named plaintiff, Cooperativa Ahorro y Credito Aguada, hereby appeals to the United States Court of Appeals for the First Circuit from the Opinion and Order entered in this action of the 31st day of October, 1991, dismissing the claim against defendant Ramon Almonte under 18 U.S.C. sec. 1962(c) for failing to state a cause of action, and declining to exercise pendent jurisdiction and thereby dismissing without prejudice all local law fraud claims."

See Addendum 2.

As can be readily appreciated, Cooperativa chose to appeal only the dismissal of the causes of action included in paragraphs 2 and 3 of the October 31, 1991 Judgment, that is, the

claim against co-defendant Almonte under 18 U.S.C. sec. 1962(c) (the only remaining RICO claim) and the district court's decision declining to exercise pendent jurisdiction on all local law fraud claims. It purposely left out from its notice of appeal the dismissal of all federal securities law claims (Paragraph 1 of October 31, 1991 Judgment), including those under Section 10(b) of the 1934 Securities Exchange Act, which Section 27A purports to reinstate.

Fed. R. App. p. 3(c) establishes the content of the notice of appeal. In its pertinent part it provides that "[t]he notice of appeal ... shall designate *the judgment, order, or part thereof appealed from* ... (Emphasis added.) Compliance with the requirements of Rule 3(c) is mandatory and jurisdictional. *Smith* v. *Barry*, ____ U.S. ____, 112 S.Ct. 678, 682 (1992); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315-16 (1988); *Kotler* v. *American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990), vacated for other reasons ____ U.S. ____, 112 S.Ct. 3019, 120 L.Ed.2d 891 (1992).

Courts of appeals are required to construe liberally the mandates of Rule 3(c) to prevent a defeat of appellate jurisdiction by a mere technicality when the intent to appeal from a particular judgment, or part of it, is manifest or the litigant's actions are the functional equivalent of what the rule requires. *Smith* v. *Barry*, 112 S.Ct. at 681-682; *Torres* v. *Oakland Scavenger Co.*, 487 U.S. at 316-17; *Foman* v. *Davis*, 371 U.S. 178, 181 (1962); *Mariani Giron* v. *Acevedo Ruiz*, 945 F.2d 1, 3 (1st Cir. 1991); *Kotler* v. *American Tobacco Co.*, 926 F.2d at 1221.

The crux of the inquiry as to who, or what has been appealed is the notice afforded to the other parties and to the court by the document. *Smith* v. *Barry*, 112 S.Ct. at 682. For this determination, the court can be aided by an examination of the record as a whole. *Kotler* v. *American Tobacco Co.*, 926 F.2d at 1221.[2]

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[2] In *Kotler*, this court holds that, although equally mandatory and jurisdictional, the specificity standard needed to comply with the part of Rule 3(c) which refers to the designation of the "judgement, order or part

Applying these principles to this case, it is evident that Cooperativa failed to timely appeal the dismissal of the federal securities claims, including those under section 10(b) of the Securities Act of 1934.

The October 31, 1991 Judgment dismissed all the claims remaining in the case by categories and in separate paragraphs. *See* p. 3-4, *ante; see also*, Addendum 1. In its notice of appeal Appellant Cooperativa designated exclusively and specifically the causes of action dismissed in paragraphs 2 and 3 of the judgment, namely, "the claim against defendant Ramon Almonte under 18 U.S.C. Sec. 1962(c)" (paragraph 2 of the judgment) and the district court's decision declining to exercise pendent jurisdiction over the local law fraud claim (paragraph 3 of the judgment). *See* p. 4, *supra; see also*, Addendum 2. By affirmatively designating those two distinct parts of the judgment, Cooperativa clearly and unambiguously gave notice to the other parties and to the court that it was deliberately excluding from its appeal those causes of actions which were dismissed in paragraph 1 of the judgment, the federal securities claims, including the § 10(b) cause of action.

Because of the manifest intention to exclude the undesignated parts of a judgment, courts of appeals of virtually all circuits have uniformly held that when, as here, an appellant specifically refers to only parts of a judgment in his notice of appeal, only the designated parts are appealed and, therefore, the Court lacks jurisdiction to review the undesignated parts. *See e.g. Lusardi* v. *Xerox Corp.*, 975 F.2d 964, 972 (3d Cir. 1992); *Pope* v. *MCI Telecommunication Corp.*, 937 F.2d 258, 266 (5th Cir. 1991) *cert. denied*, 118 L.Ed.2d 558 112 S.Ct. 1956 (1991); *Wilson* v. *Firestone Tire & Rubber Co.*, 932 F.2d 510, 516 (6th Cir. 1991); *Lockary* v. *Kayfetz*, 917 F.2d 1150, 1157 (9th Cir. 1990); *Cunico* v. *Pueblo School District*, 917

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thereof" is looser than that implicated in *Torres* which refers to the designation of the party filing the Appeal. *Kotler*, 926 F.2d 1221. Hence, *Kotler* adds that it is the duty of the Court of Appeals to determine the intention of the Appellant from the Notice of Appeals and the record as a whole.

F.2d 431, 444 (10th Cir. 1990); *Durango Associates, Inc.* v. *Reflange, Inc.*, 912 F.2d 1423, 1425 (Fed. Cir. 1990); *Roberts* v. *College of the Dessert*, 870 F.2d 1411, 1418 (9th Cir. 1988); *Brandt* v. *School Associates, Inc.*, 854 F.2d 948, 954 (7th Cir. 1988); *Brookens* v. *White*, 795 F.2d 178, 180 (D.C. Cir. 1980); *Weinar* v. *Rollform Inc.*, 744 F.2d 797, 804 (Fed. Cir. 1984) *cert. denied* 470 U.S. 1084, 85 L.Ed.2d 143, 143 S.Ct. 1844 (1985); *Averitt* v. *Southland Motors Inn of Oklahoma*, 720 F.2d 1178, 1180 (10th Cir. 1983); *Pitney Bowes* v. *Mestre*, 701 F.2d 1365, 1374 (4th Cir. 1983) *cert. denied* 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983); *C.A. May Marine Supply Company* v. *Brunswick Corporation*, 649 F.2d 1049, 1056 (5th Cir. 1981); *cert. denied* 454 U.S. 1125, 102 S.Ct., 974, 71 L.Ed.2d 112 (1981); *Dreyton* v. *Jiffee Chemical Corp.*, 591 F.2d 352, 361, n.10 (6th Cir. 1978); *Elfman Motors, Inc.* v. *Chrysler Corp.*, 567 F.2d 1252, 1254 (3rd Cir. 1977); *Bach* v. *Coughlin*, 508 F.2d 303, 306 (7th Cir. 1974). This conclusion is particularly appropriate where, as here, the parts of the judgment are truly independent. 9 J. Moore & B. Ward *Moore's Federal Practice* § 203.17[2] at 3-84 (2d Ed. 1993); *see also, C.A. May Marine Supply Co.* v. *Brunswick Corporation*, 649 F.2d at 1056.

Moreover, an examination of the record as a whole, as this court recommends in *Kotler*, 926 F.2d at 1221, furthers the conclusion that Cooperativa intended to abandon its federal securities claims by not appealing their dismissal. In its "Motion for Voluntary Dismissal" filed with this court on December 30, 1991, Cooperativa states:

> "(1) The appeal noticed in this case referred to the dismissal of a certain 18 U.S.C. § 1862(c) claim against Appellee Defendant Ramon M. Almonte entered in this action on October 31, 1991. (Docket # 66). That ruling by the District Court also dismissed certain federal securities law claims made by the appellant on the authority of the Supreme Court's decision in *Lampf, Pleva Lipkind Prupis & Petigrow* v. *Gilbertson*, ____ U.S. ____, 111

S.Ct. 2773 (1991). No appeal was filed concerning those claims.

See Addendum 3.[3] Furthermore, on page 3 of its Motion Requesting Reinstatement of the Dismissed Cause of Action, filed in the District Court on December 27, 1991, Cooperativa states that the November 27, 1991 appeal "did not seek the review of this court's dismissal of the federal securities claims . . ." *See* Addendum 4.[4] Finally, in its brief to this court in this appeal, Cooperativa once again accepts that it "did not seek review of the District Court's dismissal of the federal securities claims . . ." Brief of Cooperativa at 5 n.4.[5]

Given the above, and applying the most liberal construction of Fed. R. App. p. 3 (c), the conclusion is forced: Cooperativa failed to appeal the dismissal of the federal securities claims, including those based on § 10(b). This is not a technicality, for the notice of appeal was not technically defective; it is the result of Cooperativa's unambiguous intention to exclude these issues from its appeal.

Fed. R. App. P. 4 establishes that an appeal in civil cases is taken by filing the notice of appeal required by Fed.R.App. 3 within 30 days after the day of the entry of the judgment. Because of the mandatory and jurisdictional nature of the time prescribed in F.R. App. P. 4, the judgment on the federal securities claims became final and unreviewable on November 30, 1991, 30 days after the entry of the judgment dismissing these claims. *See*, *Smith* v. *Barry*, 112 S.Ct. at 682; *Torres* v. *Oakland Scavenger Co.*, 487 U.S. at 315; *Budinich* v.

[3] This "Motion for Voluntary Dismissal" was not included in the Appendix to Appellant's Brief, yet Cooperativa did include it as an addendum to its Reply Brief filed on January 11, 1993.

[4] This motion is included in Appendix Vol. II, p. 539-43.

[5] The reasons that Cooperativa may have had for excluding the federal securities issues from its appeal are not determinative. Because of the jurisdictional and mandatory nature of Rule 3(c), failure to comply with the Rule divests the court of jurisdiction to review regardless of good cause shown. *Torres*, 487 U.S. at 317. In any event, Cooperativa must take the bitter with the sweet; after all, its causes of action had been dismissed.

Becton Dickinson and Co., 486 U.S. 196, 203 (1986); *Marin Piazza* v. *Aponte Roque*, 909 F.2d 35, 38-39 (1st Cir. 1990); cases cited on pages 6-7, *supra*. Thus, contrary to the panel's opinion, at the time Section 27A was enacted into law, December 19, 1991, there was a final and unreviewable judgment concerning all the federal securities claims, including those brought under § 10b.

II.

SECTION 27A IS UNCONSTITUTIONAL FOR IT DEPRIVES KIDDER OF A CONSTITUTIONALLY PROTECTED VESTED RIGHT IN ITS UNREVIEWABLE AND FINAL JUDGMENT

No circuit court has ruled that Section 27A can reinstate claims dismissed in an unreviewable, final judgment. This case is the first opportunity by a Circuit Court to squarely address whether the vested rights doctrine renders unconstitutional Section 27A as it applies to unreviewable, final judgments.

In addition to this Court's May 19, 1993 Opinion, ten Circuit Court cases have interpreted Section 27A. Six of those cases have not addressed the constitutionality of Section 27A.[6] Of the remaining four cases, two expressly declined to consider the constitutionality of Section 27A as applied to claims that were unreviewable and therefore, final at the time of its enactment.[7]

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[6] (1) *Durning* v. *Citibank International*, 1993 U.S. App. Lexis 6992 (Ninth Circuit) Opinion of April 7, 1993; (2) *Block* v. *First Blood Associates*, 988 F.2d 344 (2nd Cir.), 1993 U.S. App. Lexis 4852; (3) *Litton Indus. Inc.* v. *Lehman Bros Kuhn Loeb, Inc.*, 967 F.2d 742 (2d Cir. 1992); (4) *Grondahl* v. *Merritt & Harris, Inc.*, 964 F.2d 1290 (2d Cir. 1992); (5) *Henley* v. *Slone*, 961 F.2d 23 (2d Cir. 1992); (6) *Pommer* v. *Medtest Corp.*, 961 F.2d 620 (7th Cir. 1992).

[7] *Gray* v. *First Winthrop*, 989 F.2d 1564, 1993 U.S. App. Lexis 6995 (9th Cir. April 7, 1993), "... we express no opinion regarding the constitutionality of Section 27A as it applies to cases that were *final* at the time of its

The two remaining cases, *Henderson* v. *Scientific Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992) and *Anixter* v. *Home Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied* 1992 WL 391280 (April 19, 1993), which were cited by this Court in its May 19, 1993 opinion, can be clearly distinguished from, and are inapplicable to, the case at bar. Both involved judgments that were still reviewable and thus, not final. Therefore, no property rights had yet been vested by a final judgment and there was no need for the Circuit Courts to squarely rule on whether Section 27A violates the so-called "vested rights" doctrine, as applied to a case like the one at bar, where there is an unreviewable, final judgment.

Henderson, in addition to lacking a final judgment, did not discuss the doctrine of vested rights inherent in final unreviewable judgments when holding Section 27A constitutional in light of due process, equal protection and separation of powers challenges.

Anixter is also clearly distinguishable and therefore inapplicable to the case at bar. *Anixter* also lacked an unreviewable and final judgment. In *Anixter*, defendants had appealed to the Tenth Circuit from a District Court judgment in favor of plaintiffs, *Anixter* v. *Home Stake Production Co.*, 76 FRD 337 (D. Oklah. 1975); the Tenth Circuit reversed, finding plaintiff's claims time-barred based on *Lampf, Pleva, Lipking, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. ____,

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enactment." 1993 U.S. App. Lexis 6995, at p. 16. (Emphasized.). *Berning* v. *A. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993), 1993 U.S. App. Lexis 6074, (7th Cir. March 25, 1993).

> "As an initial matter, we need not reach the broker's contention that section 27A violates the Constitution by impermissible upsetting *final* judgments of the Courts. Whatever the merits of that argument in the abstract, the stark fact is that in the instant case there is no final judgment to be upset. At the time that Section 27A was passed, this case was *pending* on appeal." (Emphasized.)

1993 U.S. App. Lexis 6074 at p. 16. Contrary to Cooperativa in this case, plaintiffs in *Berning* had filed a timely appeal of the District Court's *Lampf Pleva* dismissal of Berning's securities claim and said appeal was pending before the Circuit Court when Section 27A was enacted.

115 L.Ed.2d 321, 111 S.Ct. 2773 (1991). *Anixter* v. *Home Stake Production Co.*, 939 F.2d 1420 (10th Cir. 1991). The Tenth Circuit amended its order on denial of rehearing, *Anixter* v. *Home Stake Production Co.*, 947 F.2d 897 (10th Cir. 1992), and the plaintiffs timely petitioned for certiorari to the Supreme Court, which granted it, vacated the judgment and remanded, 112 S.Ct. 1658 (1992). On remand and while under the consideration of the Tenth Circuit, Section 27A was enacted.

In evaluating defendants' due process and equal protection challenges, the *Anixter* Court made a passing reference to the vested rights doctrine, quoting *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 315-16 (1945):

> "... Assuming that statutes of limitations, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment."

Anixter at 977 F.2d at 1546. This quote is inapplicable to a determination of the constitutionality of Section 27A when under attack for affecting rights vested by a final judgment. *Chase's* holding was based on the absence of an unreviewable final judgment. *Chase* clarified that the constitutionality of the amendment challenged therein was upheld precisely *because* the case was *pending* and no rights inherent in a final judgment had vested.

> "... the existence of the (statute of limitations) policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy *before final adjudication*. Whatever grievance appellant may have at the change of policy to its disadvantage, it *had acquired no immu-*

> *nity from this suit that has become a Federal Constitutional right.*"

Chase, 325 U.S. at 316 (emphasis added).

Thus, the Supreme Court in *Chase* recognized that a "vested right" in a final judgment is a "Federal Constitutional right".

In its brief reference to the vested rights doctrine, *Anixter* also cited a district court case which found that legislation altering a statute of limitations defense and its application to dismissed cases, ". . . goes far less to the heart of the judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question." *Anixter*, 977 F.2d at 1546, quoting *Axel Johnson, Inc.* v. *Arthur Andersen & Co.*, 790 F.Supp. 476, 483 (S.D.N.Y. 1992).

Axel Johnson not only misreads *Chase's* holding for *pending* cases but also blatantly ignores *Chase's* recognition that final adjudications vest fundamental rights. Furthermore, *Axel Johnson's* distinction between the finality of judgment's dismissing cases "on the merits" and "on statute of limitation grounds" is contrary to the law in this Circuit. The law in this Circuit on the effect of a dismissal based on a statute of limitations is clear:

> "It is beyond peradventure that the dismissal of a claim as time-barred constitutes a judgment on the merits, entitled to preclusive effect. See, e.g. *Rose* v. *Town of Harwick*, 778 F.2d 77, 80 (1st Cir. 1985), *cert. denied*, 476 U.S. 1159, 90 L.Ed.2d 720, 106 S.Ct. 2278 (1986)."

Kale v. *Combined Insurance Co.*, 924 F.2d 1161, 1164 (1st Cir. 1991) *cert. denied*, 116 L.Ed.2d 44, 112 S.Ct. 69. Since the District Court's October 31, 1991 dismissal of Cooperativa's federal securities claims was a final judgment "on the merits entitled to preclusive effect," *ante*, it is a vested property right that Section 27A cannot constitutionally set aside.

In addition to *Axel Johnson*, various District Courts have interpreted the constitutionality of Section 27A under a plethora of attacks. Although no consensus has been reached, when faced with an unreviewable and final judgment most district courts have been inclined to determine Section 27A unconstitutional in so far as it affects rights inherent in final judgments.[8] In assessing the unconstitutionality of Section 27A as it applies to final judgments, these district courts have focused on the basic and undisputable precepts of *McCullough* v. *Virginia*, 172 U.S. 102, 123-24, 19 S.Ct. 134, 142, 43 L.Ed. 382 (1898);

> "It is not within the power of the legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."

Congress lacks the power to upset the final judgments of either the Supreme Court or lower federal courts. *In re Brichard*, 788 F.Supp. at 1107.

Aside from *Axel Johnson;* only one other case has found Section 27A constitutional even in light of the existence of a final judgment. *Brown* v. *Hutton Group*, 795 F.Supp. 1307 (S.D.N.Y. 1992). *Brown* and *Axel Johnson* tried to distinguish the language of *McCullough* by stating that dismissals by the lapse of a statute of limitations are dismissals by a mere technicality and that judgments in light of that technicality do not warrant the protection or respect afforded to final judgments on the substantive merits. *Brown* v. *Hutton*, 795 F.Supp. at

[8] *Treiber* v. *Katz*, 796 F.Supp. 1054 (E.D. Mich. 1992); *Plaut* v. *Spendthrift Farm*, 789 F.Supp. 231 (E.D. Ky. 1992); *Johnston* v. *Cigna Corp.*, 789 F.Supp. 1098 (D. Colo. 1992); *In re Brichard Securities Litigation*, 788 F.Supp. 1098 (N.D. Cal. 1992); *Pacific Mutual Life Insurance* v. *First Republicbank Corp.*, 806 F.Supp. 108 (N.D. Tx. 1992)).

1315; *Axel Johnson* v. *Arthur Andersen & Co.*, 790 F.Supp. at 482.[9] As mentioned before, this Circuit has determined that dismissals based on the applicability or existence of a statute of limitations are dismissals on the merits, indistinguishable from all other judgments. *Kale* v. *Combined Ins. Co.*, 964 F.2d at 1164 and cases cited therein.

Therefore, the possible persuasiveness of the arguments used by the district courts in *Axel* and *Brown* is of no effect to this court, which if not reversing its prior decision, should abide by its determination that dismissals by statute of limitations are dismissals on the merits. Furthermore, as mentioned in *Treiber* v. *Katz*, 796 F.Supp. at 1060,

> "(e)ven though Defendants do not have vested rights in a particular statute of limitation, Defendants do have vested rights in the Court's judgment dismissing Plaintiff's 10b claims. Once a lawsuit is finally adjudicated, the rights become vested and Congress cannot constitutionally divest them."

CONCLUSION

In light of the arguments presented and the distinctions drawn, as discussed above, and incorporating into this petition the arguments set forth in pages 27-40 of Kidder's brief, petitioner respectfully requests that this case be reheard en banc and the District Court's Judgment be affirmed.

WHEREFORE, Kidder respectfully prays this Court grant this petition and confirm the Judgment of Dismissal entered by the District Court on September 4, 1992.

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[9] *Axel* further disregards the finality of the judgement entered in the case by saying that the judgement was not overtly final because it could still be subject to a Federal Rule of Civil Procedure Rule 60(b) motion to reopen the case. The availability of this possibility does not affect the finality of a judgement and the vesting of the rights inherent in a final judgement.

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JORGE E. PEREZ DIAZ

CERTIFICATE OF SERVICE

I hereby certify that on this same date two copies of the brief for Kidder, Peabody & Co. have been hand delivered to Roberto Boneta, 208 Ponce de Leon Avenue, 1800 Popular Center, Hato Rey, Puerto Rico 00918-1009; Harry E. Woods, Woods & Woods, P.O. Box 3600, Hato Rey, Puerto Rico 00919 and to Guillermo Bobonis, Bobonis, Bobonis & Rodriguez Poventud, 129 De Diego Avenue, Condado, Puerto Rico 00911-1927.

/s/ NESTOR M. MENDEZ GOMEZ

NESTOR M. MENDEZ GOMEZ

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CIVIL NO. 89-1706 (JAF)

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
PLAINTIFF,

v.

KIDDER, PEABODY & CO.; PAINE WEBBER, INCORPORATED; RAMON M. ALMONTE, JANE DOE, AND THE PROPERTY PARTNERSHIP EXISTING BETWEEN THEM,
DEFENDANTS.

JUDGMENT

Pursuant to the terms of an Opinion and Order announced by the court today, judgment is now entered as follows:

1. The court now DISMISSES all federal securities law claims. Claims under section 10(b) of the 1934 Securities Act, Rule 10b-5, 15 U.S.C. § 78j(b), are time-barred according to *Lampf*, as are claims under section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a). Claims under section 15(c)(1)-(2) of the 1934 Act, 15 U.S.C. § 78o(c)(1)(2), are also time-barred under section 29(b) of the 1934 Act, 15 U.S.C. § 78cc(b). Claims under section 20 of the 1934 Act, 15 U.S.C. § 78t, are dismissed for failure to state a cause of action.

2. This court also DISMISSES the remaining section 1962(c) claim against defendant Almonte for failing to state a cause of action.

3. This court declines to exercise pendent jurisdiction and DISMISSES without prejudice all local law fraud claims.

Accordingly, judgment is hereby entered dismissing the complaint as to all defendants.

San Juan, Puerto Rico, this 31st day of October, 1991.

/s/ JOSE ANTONIO FUSTE

JOSE ANTONIO FUSTE
U.S. District Judge

s/cs: OB
H. WOODS
R. BONETA
G. BOBONIS
N. MENDEZ
ILLEGIBLE

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civil No. 89-1706 (JAF)

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
PLAINTIFF,

v.

KIDDER, PEABODY & CO.; PAINE WEBBER, INCORPORATED; RAMON M. ALMONTE, JANE DOE, AND THE PROPERTY PARTNERSHIP EXISTING BETWEEN THEM,
DEFENDANTS.

NOTICE OF APPEAL

To The Honorable Court:

NOTICE is hereby given that the above named plaintiff, Cooperativa Ahorro y Credito Aguada, hereby appeals to the United States Court of Appeals for the First Circuit from the Opinion and Order entered in this action on the 31st day of October, 1991, dismissing the claim against defendant Ramon Almonte under 18 U.S.C. sec. 1962(c) for failing to state a cause of action, and declining to exercise pendent jurisdiction and thereby dismissing without prejudice all local law fraud claims.

In San Juan, Puerto Rico, this 27th day of November, 1991.

MUNOZ BONETA GONZALEZ ARBONA
BENITEZ & PERAL
1800 Popular Center
Hato Rey, Puerto Rico 00918-1052
Tel.: 751-9393

By: ROBERTO BONETA
ROBERTO BONETA
USDC-PR No. 115212

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 91-2321
(U.S. District Court Number
Civil 89-1706 JAF)

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
APPELLANT,

v.

KIDDER, PEABODY & CO.; PAINE WEBBER, INCORPORATED; RAMON M. ALMONTE, JANE DOE, AND THE COMMUNITY PROPERTY PARTNERSHIP EXISTING BETWEEN THEM,
APPELLEES.

MOTION FOR VOLUNTARY DISMISSAL

APPELLANT COOPERATIVA AHORRO Y CREDITO AGUADA HEREBY MOVES FOR THE VOLUNTARY DISMISSAL OF THE APPEAL FILED IN THIS CASE AS FOLLOWS:

(1) THE APPEAL NOTICED IN THIS CASE REFERRED TO THE DISMISSAL OF A CERTAIN 18 U.S.C. § 1862(c) claim against Appellee defendant Ramon M. Almonte entered in this action on October 31, 1991. (Docket #66). That ruling by the District Court also dismissed certain federal securities law claims made by the appellant on the authority of the Supreme Court's decision in *Lampf, Pleva Lipkind Prupis & Petigrow* v. *Gilbertson*, ____ U.S. ____, 111 S.Ct. 2773 (1991). No appeal was filed concerning those claims.

(2) On December 19, 1991, PL 102-242 (the Federal Deposit Insurance Corporation Improvement Act of 1991) came into effect. Section 476 of that law mandated the elimination of the retroactive effects of the *Lampf Pleva* ruling by permitting claimants to seek the reinstatement of any claims

dismissed subsequent to June 19, 1991 and directing that the limitations periods which existed prior to that date be applied.

(3) On this same date appellant has applied for the reinstatement of its federal securities claims before the District Court. (See attached motion).

(4) Previously, on December 16, 1991 appellant had moved the District Court for the voluntary dismissal of its appeal pursuant to Rule 42(a) of Appellate Procedure. (See attached copy) The docket was filed before the Appeals Court on December 20, 1991 before the District Court could act upon appellant's motion for voluntary dismissal.

(5) Considering that PL 102-242 now mandates the reinstatement of plaintiff's federal securities law claims, appellant does not desire to fragment this case. Furthermore, appellant believes that if its securities law claims are reinstated this Court would probably lack jurisdiction to consider this appeal for lack of finality.

WHEREFORE, it is most respectfully requested that pursuant to Rule 42(b) of Appellate Procedure this appeal be dismissed without prejudice and that no costs be assessed.

RESPECTFULLY SUBMITTED, this 27th day of December 1991.

I HEREBY CERTIFY that on this same date a true and exact copy of this motion was mailed to: Fernando L. Gallardo, Esq., Woods & Woods, P.O. Box 3600, Hato Rey, Puerto Rico 00919; Guillermo J. Bobonis, Esq. and Carlos Bobonis Gonzalez, Esq., Bobonis, Bobonis & Rodriguez Poventud, 129 de Diego Ave., Condado, Puerto Rico 00911-1927; Nestor M. Mendez-Gomez, Esq. and Richard Graffam, Esq., McConnel, Valdez, Kelly, Sifre, Griggs & Ruiz-Suria, G.P.O. Box 4225, San Juan P.R. 00936; and

Sheila Chervin, Esq., Kidder Peabody & Company, 20 Exchange Place, 8th Floor, New York, New York 10005.

In San Juan, Puerto Rico, this 27th day of November, 1991.

MUNOZ BONETA GONZALEZ ARBONA
BENITEZ & PERAL
1800 Popular Center
Hato Rey, Puerto Rico 00918-1052
Tel.: 751-9393

By: ROBERTO BONETA

ROBERTO BONETA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 89-1706 (JAF)

COOPERATIVA DE AHORRO Y CREDITO AGUADA,
PLAINTIFF,

v.

KIDDER, PEABODY & CO.; PAINE WEBBER, INCORPORATED; RAMON M. ALMONTE, MAYLEEN GRATACOS AND THE COMMUNITY PROPERTY PARTNERSHIP EXISTING BETWEEN THEM,
DEFENDANTS.

MOTION FOR REINSTATEMENT OF ACTION, FOR RECONSIDERATION AND FOR TRIAL SETTING

To The Honorable Court:

COMES NOW the plaintiff Cooperativa Ahorro y Credito Aguada ("Cooperativa") through counsel and most respectfully states and prays as follows:

(1) On December 19, 1991 President Bush signed PL 102-242 known as the Federal Deposit Insurance Corporation Improvement Act of 1991. Section 476 of that Act amends Section 27A of the Securities Exchange Act of 1934 as follows:

> "SPECIAL PROVISION RELATING TO STATUTE OF LIMITATIONS ON PRIVATE CAUSES OF ACTION
>
> "SEC. 27A. (a) EFFECT ON PENDING CAUSES OF ACTION. — The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the juris-

diction, including principles of retroactivity, as such laws existed on June 19, 1991.

"(b) EFFECT ON DISMISSED CAUSES OF ACTION. — Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 —

"(1) which was dismissed as time barred subsequent to June 19, 1991, and

"(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.". (See attached Westlaw printout)

(2) The effect of new section 27A of the 1934 Act is to end the retroactive effects of the *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*[1] decision. (See: CCH Federal Securities Law Reports Number 1476, attached hereto).

For the reasons stated in Plaintiff's Joint Opposition to Motions to Dismiss and Memorandum of Law in Support Thereof filed on May 25, 1990 the securities claims filed by the plaintiff in this case were not time barred under existing law as of June 19, 1991.[2] Pursuant to Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (PL 102-242) plaintiff most respectfully moves the Hon. Court for the reinstatement of all securities claims dismissed by the Court's Opinion and Order of October 31, 1991. Plaintiff also requests that in view of the required reinstatement of plaintiff's federal securities claims and the common nucleus of operative facts existing between those claims and the state law claims made herein, that the Hon. Court also exercise pendant jurisdiction with respect to those state law claims.

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[1] 111 S.Ct. 2773 (1991).

[2] Prior to the *Lampf, Pleva* and *James B. Beam Distilling Company* v. *Georgia*, ___ U.S. ___, 111 S.Ct. 2439 (1991) decisions.

(3) On November 27, 1991 plaintiff filed a Notice of Appeal concerning the dismissal of the 18 U.S.C. § 1962(c) RICO claims against Almonte. On December 16, 1991 the plaintiff filed a motion pursuant to Rule 42(a) of the Rules of Appellate Procedure seeking the voluntary dismissal of that appeal by this Court as the appeal as of that date had not yet been docketed with the Appeals Court. Before the Court could act on that motion the appeal was docketed by the Clerk of this Court with the Appeals Court on December 20, 1991 (See attached copies). Plaintiff has now moved the Appeals Court for the voluntary dismissal of that appeal. That appeal did not seek the review of this Court's dismissal of the federal securities claims since prior to the adoption of PL 102-242 counsel considered the Court's ruling correct under existing law at the time. This Court, therefore, has jurisdiction to reinstate both the federal securities claims and the state law claims since they were not the subject of the appeal.

(4) This action was filed on February 13, 1990 and as a result of the procedural situation caused by the *Lampf, Pleva* case was stayed for several months and was subsequently dismissed. Except for limited discovery allowed by the Court concerning the then pending RICO claim against Almonte, this case has not been the subject of any discovery for over 22 months. It is most respectfully requested that in the interests of justice a discovery deadline be adopted by the Court and that this case be set for trial shortly thereafter.

(5) In view of the reinstatement required by PL 102-242 of plaintiff's federal securities claims and the reconsideration requested with respect to the pendant state claims, the pending bills of costs and Almonte's motion for attorneys fees should be denied. Plaintiff also incorporates by reference its prior filings on this subject.

WHEREFORE, the plaintiff Cooperativa most respectfully requests the following:

(1) that all federal securities claims dismissed by the Court on October 31, 1991 be reinstated pursuant to PL 102-242;

(2) that the Honorable Court reconsider the dismissal without prejudice of plaintiff's state law claims and exercise pendant jurisdiction with respect to those claims;

(3) that defendants' bills of costs and Almonte's motion for attorneys fees be denied; and

(4) that a discovery cut-off date and a trial date be set in this case.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 27th day of December 1991.

I HEREBY CERTIFY that on this same date a true and exact copy of this motion was mailed to: Fernando L. Gallardo, Esq., Woods & Woods, P.O. Box 3600, Hato Rey, Puerto Rico 00919; Guillermo J. Bobonis, Esq. and Carlos Bobonis Gonzalez, Esq., Bobonis, Bobonis & Rodriguez Poventud, 129 de Diego Ave., Condado, Puerto Rico 00911-1927; Nestor M. Mendez-Gomez, Esq. and Richard Graffam, Esq., McConnel, Valdez, Kelly, Sifre, Griggs & Ruiz-Suria, G.P.O. Box 4225, San Juan, P.R. 00936; and Sheila Chervin, Esq., Kidder Peabody & Company, 20 Exchange Place, 8th Floor, New York, New York 10005.

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USDC-PR 115212

APPENDIX H

No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 1992

KIDDER, PEABODY & CO.,
PETITIONER,
v.
COOPERATIVA DE AHORRO Y CREDITO AGUADA,
RESPONDENT.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Justice David H. Souter, Associate Justice of The Supreme Court and Circuit Justices for the First Circuit:

Petitioner Kidder, Peabody & Co.[1] prays for a twenty-day extension of time to file its petition for certiorari in this court to and including October 11, 1993.

The Court of Appeals rendered its decision on May 19, 1993. *See*, Appendix 1. Judgment was entered on that same date. *See*, Appendix 2. On May 27, 1993, Petitioner requested

[1] Kidder, Peabody & Co., is a wholly-owned subsidiary of Kidder Peabody Group, Inc., which is a wholly-owned subsidiary of General Electric Financial Services, Inc., which in turn is a wholly-owned subsidiary of General Electric Company, a corporation that has issued shares to the public. Kidder, Peabody & Co. has only one subsidiary company that is not wholly-owned which is Kidder, Peabody Sales Agency of Ohio.

an extension of time of ten (10) days, that is, until June 14, 1993, to file a Petition for Rehearing and a Suggestion that the case be Reheard En Banc. *See*, Appendix 3. The Court of Appeals granted the extension requested on June 1, 1993. *See*, Appendix 4. Thereafter, on June 10, 1993, Petitioner filed a timely "Petition for Rehearing, with a Suggestion that the Case be Reheard En Banc". *See*, Appendix 5. On June 23, 1993, the United States Court of Appeals for the First Circuit issued an Order denying Petitioner's Petition for Rehearing and its Suggestion that the Case be Reheard En Banc. *See*, Appendix 6. Therefore, the Petition for Writ of Certiorari in this case expires on September 21, 1993.[2] This application is being filed more than ten days before that date.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

As Rule 10 of the Rules of this Honorable Court states, "a petition for a writ of certiorari will be granted only where there are special and important reasons therefor". One of the reasons which is given considerable weight in making the determination of whether to grant a petition for a writ of certiorari is if there is a conflict or split in the decisions on the same matter of several courts of appeals. *Rule 10 of the Rules of the United States Supreme Court.*

The decision in this case is, on Petitioner's view, erroneous. As argued fully before the United States Court of Appeals for the First Circuit, Petitioner believes that Section 27A of the Securities Exchange Act, as amended in 1991, 15 U.S.C. sec. 78 aa-1, under which Respondent's dismissed cause of action was reinstated by the Court of Appeals, is unconstitutional for it violates the doctrine of separation of powers and deprives Petitioner of a constitutionally protected vested right

[2] In view of the fact that Kidder requested both a petition for rehearing and a suggestion that the case be reheard *en banc*, the time for filing a petition for writ of certiorari before the Supreme Court of the United States "runs from the date of the denial of the petition for rehearing". Rule 13.4 of the Rules of the Supreme Court of the United States; *see also*, *Missouri v. Jenkins*, 495 U.S. 33, 45-50 (1990).

in its unreviewable final judgment.[3] However, at the time the Court of Appeals decided the case and at the time it rejected Petitioner's Petition for Rehearing, no other court of appeals had ruled that Section 27A is unconstitutional. There being no split in the decisions of several court of appeals on this matter, Petitioner did not consider it appropriate, at the time, to seek this Court's review of the decision.

On August 3, 1993, however, the United States Court of Appeals for the Sixth Circuit issued an opinion in the case *Plaut* v. *Spendthrift Farms, Inc.*, 1993 U.S. App. LEXIS 19738, which considers this matter and rules that Section 27A is unconstitutional, for it violates the doctrine of separation of powers and deprives defendants of their vested rights in a final judgment. With the Sixth Circuit decision in *Plaut* and the First Circuit's decision in this case, there is now a conflict between the circuits in the same matter, namely whether Section 27A is unconstitutional. Petitioner believes that this recently created conflict provides the "special and important reasons" which Rule 10 of the Rules of this Court requires for a writ of certiorari to be granted. Yet, since the decision to proceed with the petition for a writ of certiorari is based primarily on this conflict which arose on August 3, 1993 with

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[3] Section 27A provides as follows:

"SEC. 17A. (a) EFFECT OF PENDING CAUSES OF ACTION. — The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction including principles of retroactivity, as such laws existed on June 19, 1991.

"(b) EFFECT ON DISMISSED CAUSES OF ACTION — Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 —

"(1) which was dismissed as time barred subsequent to June 19, 1991, and

"(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.".

the Sixth Circuit's decision in *Plaut*, Petitioner will require additional time to perform the work needed to properly frame and argue the issues to be presented to this Court.

WHEREFORE, Petitioner respectfully requests that an order be entered extending its time to file a petition for a writ of certiorari to and including October 11, 1993.

In San Juan, Puerto Rico, this 8th day of September, 1993.

(s) JORGE E. PEREZ
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Counsel for Petitioner

No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 1992

KIDDER, PEABODY & CO.,
PETITIONER,
v.
COOPERATIVA DE AHORRO Y CREDITO AGUADA,
RESPONDENT.

CERTIFICATE OF SERVICE

I, Jorge E. Perez, a member of the Bar of this Court, hereby certify that on this 8th day of September, 1993, a copy of the Application for Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit was personally delivered to Roberto Boneta, 208 Ponce de Leon Avenue, 1800 Popular Center, Hato Rey, Puerto Rico 00918-1009, Telephone No. (809) 751-9393; Harry E. Woods, Woods & Woods, P.O. Box 3600, Hato Rey, Puerto Rico 00919, Telephone No. (809) 759-7600, and to Guillermo Bobonis, Bobonis, Bobonis & Rodriguez Poventud, 120 De Diego Avenue, Condado, Puerto Rico 00911-1927, Telephone No. (809) 725-7941. I further certify that all parties required to be served have been served.

(s) JORGE E. PEREZ
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Counsel for Petitioner

APPENDIX H

No. A-243

In the
Supreme Court of the United States

OCTOBER TERM, 1992

KIDDER, PEABODY & CO.,
PETITIONER,
v.
COOPERATIVA DE AHORRO Y CREDITO AGUADA,
RESPONDENT.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 11, 1993.

/s/ DAVID H. SOUTER
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of September, 1993.

APPENDIX I

SECTION 27A DISTRICT COURTS DECISIONS

1. *Sommer* v. *PMEC Associates and Company Limited*, 1993 US Dist. LEXIS 12749 (S.D.N.Y., September 14, 1993)

2. *Fortenberry* v. *Foxworth Corporation*, 825 F.Supp. 1265 (S.D. Miss., 1993)

3. *Andrews* v. *Fitzgerald*, 823 F.Supp. 356 (M.D.N.C., 1993)

4. *Knapp* v. *Gomez*, 1993 US Dist. LEXIS 8577 (S.D. Cal., May 5, 1993)

5. *Jaquith* v. *Newhard*, 1993 US Dist. LEXIS 5214 (S.D.N.Y., April 20, 1993)

6. *Schell* v. *Abedon-Butwin*, 1993 US Dist. LEXIS 3174 (S.D.N.Y., March 12, 1993)

7. *Abrams & Wofsy* v. *Renaissance Investment Corporation*, 820 F.Supp. 1519 (N.D.Ga., 1993)

8. *Jameson* v. *Prudential Bache*, 1993 US Dist. LEXIS 2477 (S.D.N.Y., March 3, 1993)

9. *Lawrence* v. *Cohn*, 816 F.Supp. 191 (S.D.N.Y., 1993)

10. *Klein* v. *Goetzmann*, 816 F.Supp. 417 (N.D.N.Y., 1993)

11. *In re: Integrated Resources Real Estate Limited Partnerships Securities Litigation*, 815 F.Supp. 620 (S.D.N.Y., 1993)

12. *Schick* v. *Ernst & Young*, 808 F.Supp. 1097 (S.D.N.Y., 1992)

13. *Gilmore* v. *Berg*, 807 F.Supp. 1176 (D.N.J., 1992)

14. *Agapitos* v. *PCM Investment Company*, 809 F.Supp. 939 (M.D. Ga., 1992)

15. *Aquilio* v. *Meltzer*, 1992 US Dist. LEXIS 17425 (N.D.N.Y., November 12, 1992)

16. *Dendinger* v. *First National Corporation*, 1992 WL 318593 (E.D.La., October 28, 1992)

17. *Beaubaire* v. *Priorwood Townhomes Limited Partnership I*, 1992 US Dist. LEXIS 16629 (D. Minn., October 27, 1992)

18. *In re: First American Center Securities Litigation*, 807 F.Supp. 326 (S.D.N.Y., 1992)

19. *Ash* v. *Dean Witter Reynolds, Inc.*, 806 F.Supp. 1473 (E.D. Cal., 1992)

20. *Zaloom* v. *Trupin*, 1992 US Dist. LEXIS 14825 (S.D.N.Y., September 29, 1992)

21. *In the Matter of VMS Limited Partnership Securities Litigation*, 803 F.Supp. 179 (N.D. Ill., 1992)

22. *Gruber* v. *Price Waterhouse*, 1992 US Dist. LEXIS 14029 (E.D. Pa., September 15, 1992)

23. *RAM Investment Associates* v. *Citizens Fidelity Bank & Trust Company*, 1992 WL 240594 (S.D.N.Y., September 9, 1992)

24. *In re: Crazy Eddie Securities Litigation Oppenheimer-Palmieri Fund* v. *Peat Marwick Main & Co.*, 802 F.Supp. 804 (E.D.N.Y., 1992)

25. *Cooperativa de Ahorro* v. *Credito Aquada* v. *Kidder Peabody & Co.*, 799 F.Supp. (D.P.R., 1992)

26. *Arioli* v. *Prudential-Bache Securities*, 800 F.Supp. 1478 (E.D. Mich., 1992)

27. *Kenney* v. *Deloitta, Haskins & Sells*, 1992 US Dist. LEXIS 14600 (N.D. Cal., September 1, 1992)

28. *Cannistraci* v. *Dean Witter Reynolds, Inc.*, 796 F.Supp. 619 (D. Mass., 1992)

29. *Shields* v. *Smith*, 1992 US Dist. LEXIS 15718 (N.D. Cal., August 14, 1992)

30. *Ades* v. *Deloitte & Touche*, 799 F.Supp. 1493 (S.D.N.Y., 1992)

31. *Barr* v. *McGraw-Hill*, 1992 US Dist. LEXIS 11408 (S.D.N.Y., July 31, 1992)

32. *Barr* v. *Touche Ross & Co.*, 1992 WL 197412 (S.D.N.Y., 1992)

33. *Morin* v. *Trupin*, 799 F.Supp. 342 (S.D.N.Y., 1992)

34. *Kalmanson* v. *McLaughlin*, 1992 US Dist. LEXIS 11172 (S.D.N.Y., July 27, 1992)

35. *Fry* v. *VAL Corporation*, 1992 US Dist. LEXIS 11140 (N.D. Ill., July 21, 1992)

36. *McInnis* v. *Merrill Lynch, Pierce, Fenner & Smith*, 82 F.Supp. 1243 (M.D. Tenn., 1992)

37. *Rabin* v. *Fivzar Associates*, 801 F.Supp. 1045 (S.D.N.Y., 1992)

Supreme Court, U.S.
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No. 93-564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KIDDER, PEABODY & CO.,

Petitioner,

v.

COOPERATIVA DE AHORRO Y CREDITO AGUADA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

---

BRIEF IN OPPOSITION

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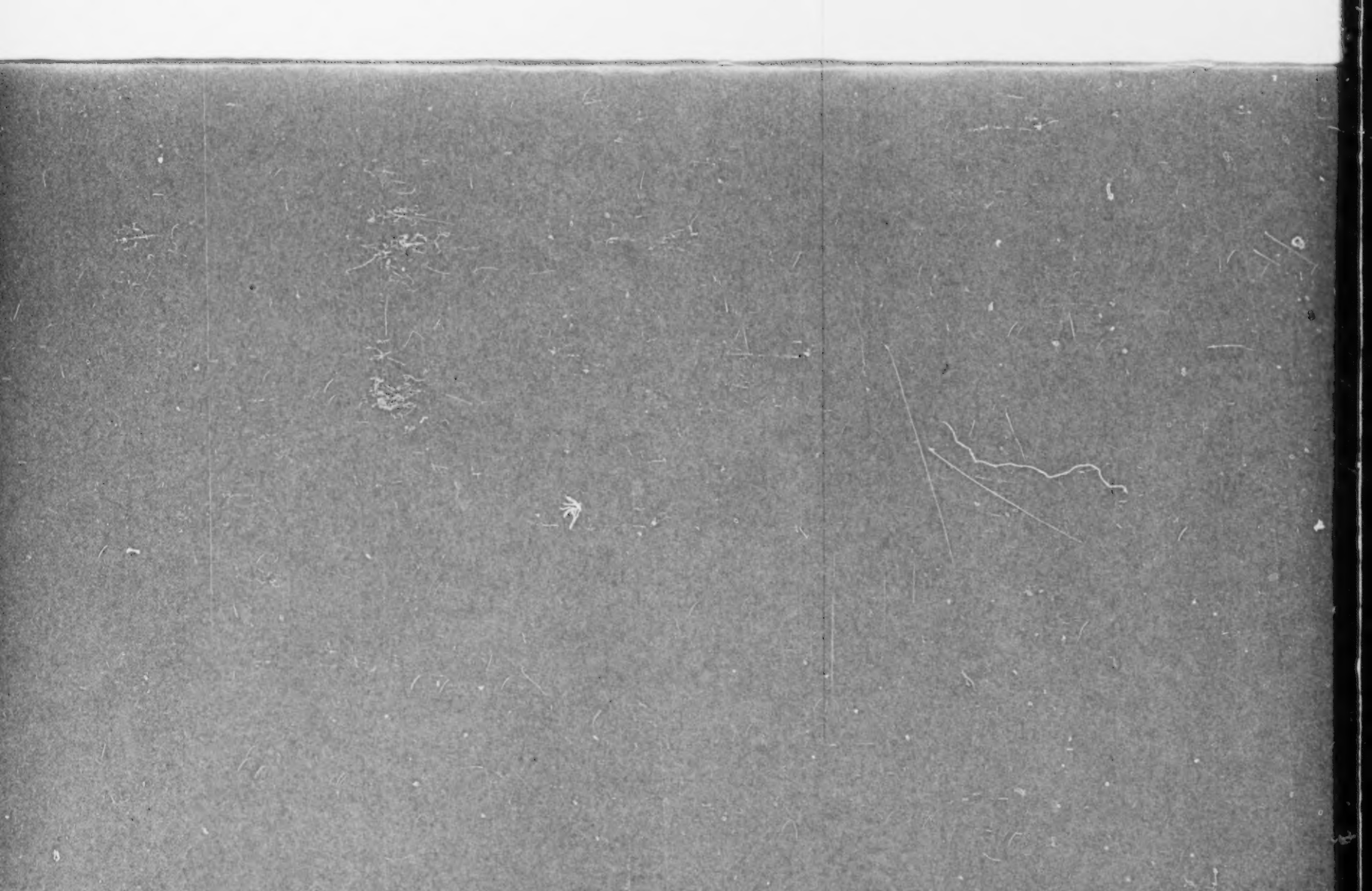

RESPONDENT'S RESTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether at the time of the enactment of Section 27A of the Securities Exchange Act of 1934, ***15 U.S.C. 78aa-1 (Supp. III 1991),*** the district court's judgment in this case was final in any respect creating a vested property right in that judgment, notwithstanding the pendency of an appeal.

2. Whether Section 27A of the Securities Exchange Act of 1934, ***15 U.S.C. 78aa-1 (Supp. III 1991),*** violates the separation of powers doctrine.

PARTIES TO THE PROCEEDINGS BELOW

The parties before the United States Court of Appeals for the First Circuit were Cooperativa de Ahorro y Credito Aguada,[1] Respondent herein; Kidder, Peabody & Co., Petitioner herein; Paine Webber Incorporated, Ramon M. Almonte, Mayleen Gratacos and the Community Property Partnership existing between the last two.[2]

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[1] Cooperativa de Ahorro y Credito Aguada is a small one branch savings and loan cooperative organized and existing under the laws of the Commonwealth of Puerto Rico.

[2] Defendants-Appellees Paine Webber Incorporated, Ramon M. Almonte, Mayleen Gratacos and the Community Property existing between the last two are neither Petitioners nor Respondents to this petition.

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IN THE

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OCTOBER TERM, 1993

No. 93-564

KIDDER, PEABODY & CO.,

Petitioner.

v.

COOPERATIVA DE AHORRO Y CREDITO AGUADA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

---

BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari filed by Petitioner, seeking review of the First Circuit's judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals, ***Pet. App. A-1,*** is reported at ***993 F.2d 269 (1st Cir. 1993).*** The opinion of the district court, ***Pet. App. A-9***, is reported at ***799 F.Supp. 261 (D.P.R. 1992).***

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1993. Petitioner requested an extension of time of ten days, until June 14, 1993, to file a Petition for Rehearing and a Suggestion that the Case be Reheard En Banc, ***Pet. App. A-22.*** The court of appeals granted the extension requested on June 1, 1993. ***Pet. App. A-24.*** On June 10, 1993, Petitioner filed a Petition for Rehearing, with a Suggestion that the Case be Heard En Banc. ***Pet. App. A-25.*** The Petition was denied on June 23, 1993. On September 13, 1993, Justice Souter extended the time within which to file a petition for a writ of certiorari until October 11, 1993. ***Pet. App. A-56.*** The jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

Section 27A of the Securities Exchange Act of 1934, as amended by Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, ***15 U.S.C. Sec. 78aa-1 (Supp. III 1991):***

> (a) *Effect on pending causes of action.*—The limitation period for any private civil action implied under section 78j of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) *Effect on dismissed causes of action.*—Any private civil cause of action implied un-

> der [section 10(b)] that was commenced on or before June 19, 1991—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in its jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.

STATEMENT OF THE CASE

On December 28, 1989, Cooperativa de Ahorro y Credito Aguada filed a complaint in the United States District Court for the District of Puerto Rico against Petitioner Kidder Peabody & Company, stockbroker Ramon Almonte and Paine Webber Incorporated. Petitioner alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78j(b), and Securities Exchange Commission Rule 10b-5, 17 C.F.R. Sec. 240.10b-5; RICO, 18 U.S.C. Sec. 1962(a), (b) and (c); as well as pendent local fraud claims.

On January 30, 1991, the district court dismissed all RICO claims against Petitioner and Paine Webber, all but one RICO claim against Almonte, and all causes of action for securities law violations against Paine Webber. ***Cooperativa de Ahorro y Credito Aguada v. Kidder, etc., 758 F.Supp. 64 (D.P.R. 1991).*** On that same date, the district court stayed Respondent's securities law claims against Petitioner

and Almonte pending a decision by this Court in ***Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, ___ U.S. ___, 111 S.Ct. 2773 (1991); Cooperativa de Ahorro y Credito Aguada v. Kidder, etc., 758 F.Supp. at 80.***

On June 20, 1991, this Court issued its decision in ***Lampf, Pleva,*** holding that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from section 9(e) of the 1934 Act, ***15 U.S.C. 78i(e).*** Under that provision, a suit may not be brought more than one year after the fraud is discovered or more than three years after it occurs. ___ U.S. at ___, ***111 S.Ct. at 2782.*** On that same day, this Court also decided ***James B. Beam Distilling Co. v. Georgia, ___ U.S. ___, 111 S.Ct. 2439 (1991),*** in which it disallowed the use in civil litigation of "selective prospectivity"—the practice of applying a new judicial interpretation of the law in the case in which it is announced but not applying it to other pending suits.

Based on ***Lampf, Pleva*** and ***Beam,*** the district court issued a second Opinion and Order and entered judgment on October 31, 1991, dismissing Respondent's Section 10(b) claims as time barred. ***Cooperativa de Ahorro y Credito Aguada v. Kidder Peabody & Co., 777 F.Supp. 153 (D.P.R. 1991).*** In that order the district court also dismissed the remaining RICO claims and refused to assume pendent jurisdiction over the state claims. ***Id.*** On November 27, 1991, Respondent filed a Notice of Appeal from the judgment entered in the district court on October 31, 1991. ***Pet. App. A-42.***

On December 19, 1991, while that appeal was pending, Congress enacted legislation adding ***Section 27A,***

15 U.S.C. 78 aa-1 (Supp. III 1991), to the 1934 Act. ***See Federal Deposit Insurance Corporation Improvement Act of 1991 (the "FDIC Improvement Act"), Pub. L. No. 102-242, Sec. 476, 105 Stat. 2387.*** Subsection (a) of Section 27A makes applicable, to Section 10(b) actions that were pending when ***Lampf*** was decided, the limitations period that had prevailed in the particular jurisdiction before ***Lampf. 15 U.S.C. 78aa-1(a) (Supp. III 1991).***

Because the enactment of Section 27A and Respondent's motion for reinstatement of the federal securities claims would have the effect of reopening the case before the district court, the "finality" of the judgment of the district court for purposes of an appeal was no longer present. Therefore, on December 27, 1991, Respondent filed a motion before the First Circuit Court of Appeals, requesting the dismissal of the then pending appeal, without prejudice. On December 31, 1991, the court of appeals entered the dismissal of the appeal.

On December 27, 1991, Respondent also filed a motion in the district court requesting reinstatement of its federal securities claims, pursuant to Section 27A. ***Pet. App. A-47.*** With Respondent's claims before it a second time, the district court set out to apply the pre-***Lampf*** statute of limitations, which in this case was the two year provision of the Puerto Rico Securities Act, ***10 L.P.R.A. Sec. 890(e). Cooperativa de Ahorro y Credito Aguada v. Kidder Peabody & Co., 799 F.Supp. 261, 263 (D.P.R. 1992).*** This two year limitation was subject to equitable tolling under the doctrine of fraudulent concealment, which provides that "the statute of limitations applicable to claims under Section 10(b) and rule 10b-5 begins to

run when an investor, in the exercise of reasonable diligence, discovered or should have discovered the alleged fraud." ***General Builders Supply Co. v. River Hill Coal Venture, 796 F.2d 8, 11 (1st Cir. 1986).***

Although the district court referred to Respondent's motion for reinstatement as a "***Fed. R. Civ. P. 60(b)*** motion for reconsideration", ***Cooperativa, 799 F.Supp. at 262,*** it went on to apply ***Fed. R. Civ. P. 12(b)*** standard, "[l]ooking at the facts in a light most favorable to [Respondent] and taking them as true". ***Id. at 264.*** Relying extensively on articles in the national press, submitted by neither party, the district court concluded that the statute of limitations commenced to run from the very date of the purchase of the securities by Respondent, and found that the complaint failed to state a timely claim under Puerto Rico's two-year statute of limitations. Accordingly, it dismissed Respondent's Section 10(b) claims a second time. ***Cooperativa de Ahorro y Credito Aguada v. Kidder 799 F.Supp. at 264-66.*** Respondent appealed the second dismissal, arguing, among other things, that the district court's reliance on materials outside of the pleadings occurred improperly and was not a valid basis for dismissing its claim.

Notwithstanding the enactment of Section 27A, Petitioner urged the court of appeals to affirm. Petitioner argued before the court of appeals, as it does now before this Court, that the application of Section 27A to the case at bar violates the doctrine of separation of powers by interfering with the judgment of the district court and deprives it of a constitutionally protected right inherent to a final judgment.

The court of appeals, holding that the district court improperly relied on materials not within the pleadings in reaching its decision, reversed the dismissal and remanded the case. ***Cooperativa de Ahorro y Credito Aguada v. Kidder Peabody & Co., 993 F.2d 269 (1st Cir., 1993). Pet. App. A-1.*** As to Petitioner's constitutional challenges to Section 27A, the court of appeals noted that a party's property right in a cause of action does not vest until a final and unreviewable judgment has been obtained. ***Id. at 273 n. 11. Pet. App. A-8.***

SUMMARY OF THE ARGUMENT

Petitioner argues that the court of appeal's decision deprived it of a constitutionally protected vested right in a final judgment. However, it is well settled that a judgment does not become final while an appeal is pending. At the time Section 27A became law and Respondent filed its motion for reinstatement of the Section 10(b) claims, the judgment of the district court was pending appeal before the court of appeals.

Even assuming *in arguendo* that the district court judgment had become final, Section 27A does not deprive Petitioner of any vested right. Congress is empowered to revive causes of action after a limitations period has expired and statutes of limitations do not go to the merits nor do they involve fundamental rights. The revival of personal civil causes of action which do not involve the creation of title does not offend Fourteenth Amendment notions of due process.

Petitioner also argues that Section 27A violates the doctrine of separation of powers. But, as numerous federal courts have held, Section 27A does not violate

the doctrine of separation of powers. Section 27A merely revises the applicable limitation period for Section 10(b) claims commenced on or before June 19, 1991. Section 27A does not revive any judgment entered by the courts; Section 27A is within the large category of statutes that simply alter the law in response to judicial interpretation.

REASONS FOR DENYING THE WRIT

Petitioner contends that Section 27A violates the doctrine of separation of powers and deprives it of a constitutionally protected vested right inherent in a final judgment. ***Pet. 10-15.*** Because the judgment of the district court was not final at the time when Section 27A became law and at the time Respondent requested reinstatement of its federal securities claims, and because the decision below is correct and consistent with the decisions of this Court, this Court's review is not warranted.

I. PETITIONER DID NOT HAVE A FINAL JUDGMENT AND SECTION 27A, THEREFORE, DOES NOT DEPRIVE PETITIONER OF A VESTED RIGHT

Petitioner's constitutional arguments are premised on the alleged finality of the judgment of the district court dismissing Respondent's Section 10(b) causes of action. The linchpin of Petitioner's arguments is that the judgment of the district court dismissing Respondent's Section 10(b) securities claims was final when 27A was enacted and at the time of Respondent's motion for reinstatement of its Section 10(b) claims. Petitioner's premise is incorrect.

On October 31, 1991, the judgment dismissing all pending federal and state claims was entered in the district court. On November 27, 1991, Respondent

filed its Notice of Appeal from that judgment. On December 19, 1991, Section 27A became law. On December 27, 1991, Respondent filed its motion for reinstatement of the Section 10(b) securities claims. On December 31, 1991, the Order of the First Circuit Court of Appeals was issued dismissing Respondent's appeal.[3] Thus, at the time Section 27A was enacted and Respondent filed its motion for reinstatement of the Section 10(b) securities claims, the judgment of the district court was subject to an appeal pending before the First Circuit Court of Appeals and was, therefore, not final.

Petitioner counters this by arguing that since Respondent did not appeal the part of the district court's judgment dismissing the Section 10(b) claims, at the time Section 27A was signed into law the part of the district court's judgment dismissing the Section 10(b) claims had become final and Petitioner had therefore somehow acquired a constitutionally protected vested right in part of the judgment. Petitioner is mistaken.

As noted by the court of appeals, a party's property right in a cause of action does not vest until a final unreviewable judgment has been obtained. ***Cooperativa de Ahorro y Credito Aguada v. Kidder, 993 F.2d at 273 n. 11, Pet. App. A-8; Hammond v. United States, 786 F.2d 8, 12 (1st Cir. 1986); Hoffman v. City of Warwick, 909 F.2d 608, 621 (1st Cir. 1990).***

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[3] *The dismissal of the appeal was based on a motion for voluntary dismissal of the appeal filed on December 27, 1991 by Respondent as a result of the enactment of Section 27A and the motion for reinstatement filed thereunder.* ***Pet. App. A-44.***

It is well settled that "[a]n appeal is not a new suit in the appellate court, but a continuation of the suit in the court below." ***Gulf Ref. Co. v. United States, 269 U.S. 125, 137 (1925).*** It is "a proceeding in the original cause," and as such, "is but a step toward the final adjudication of the original cause, which the law allows quite as much as it allows a defense in the first instance." ***Id.; Mackenzie v. A. Engelhard & Sons Co., 266 U.S. 131, 142 (1924).*** Thus, "the suit is pending until the appeal is disposed of," and "until disposition any judgment appealed from it is still 'sub judice'." ***Mackenzie v. A. Engelhard & Sons Co., 266 U.S. at 142-43; Colorado Interstate Gas v. Natural Gas Pipeline, 962 F.2d 1528, 1534 (10th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 414 (1992).***

At the time Section 27A was signed into law and Respondent filed its motion for reinstatement of the Section 10(b) claims the judgment of the district court was pending appeal before the First Circuit Court of Appeals. Accordingly, Petitioner's argument that Section 27A deprives it of "its constitutionally protected vested right inherent in a final judgment" ***(Pet. 13-17)*** is without merit. Thus, this Court's review of the judgment of the court of appeals is not warranted.

II. EVEN IF THE DISTRICT COURT'S JUDGMENT WAS FINAL, SECTION 27A DOES NOT DIVEST PETITIONER OF A CONSTITUTIONALLY PROTECTED VESTED RIGHT IN A FINAL JUDGMENT

Petitioner argues that application of Section 27A(b) to the case at bar deprived it of a constitutionally protected vested right in a final judgment. ***(Pet. 13-15).*** As previously discussed, ***infra, pp. 8-10,*** at the time Section 27A was signed into law the judgment

was not final because it was the subject of an appeal before the First Circuit Court of Appeals. Nevertheless, even assuming, *arguendo*, that the judgment had become final, Section 27A does not unconstitutionally deprive Petitioner of a vested right in the judgment.

When, as in the instant case, a judgment is the result of the application of a defense of statute of limitations, the vested rights doctrine has no application. It has long been recognized by this Court and accepted by federal courts generally that unless the passage of a statute of limitations creates a prescriptive property right, such as title in adverse possession, Congress is free to revive a cause of action after the limitations period has expired. ***See Brown v. Hutton Group, 795 F.Supp. 1307, 1315 (S.D.N.Y. 1992), citing, Campbell v. Holt, 115 U.S. 620 (1885); Adler v. Berg Harmon Associates, 790 F.Supp. 1234, 1242-43 (S.D.N.Y. 1992); Axel Johnson v. Andersen, Inc., 790 F.Supp. 476 (S.D.N.Y. 1992), aff'd 6 F.3d 78 (2d Cir. 1993).*** In ***Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945),*** this Court reaffirmed the vitality of ***Campbell,*** and found that the revival of a personal civil cause of action which did not involve the creation of title did not offend Fourteenth Amendment notions of due process.

As this Court further noted with respect to statutes of limitation "[t]heir shelter has never been regarded as what is now called a 'fundamental' right . . . the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." ***Brown v. Hutton Group, 795 F.Supp. at 1316, citing, Chase Securities Corp. v. Donaldson, 325 U.S. at 314.***

Moreover, statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and the unjust, or the voidable and avoidable delay." ***Id.*** "Legislation to alter such a technical defense, and its application even to dismissed cases, goes far less to the heart of the judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question." ***Id.; Axel Johnson v. Andersen, Inc., 790 F.Supp. at 484.***

In addition to the arguments set forth above, it is noteworthy that ***Fed. R. Civ. P. 60(b)(6)*** permits a court to relieve a party from final judgment where there is a post judgment change in the law having retroactive application. ***See Matarese v. Lefevre, 801 F.2d 98, 106 (2d Cir. 1986), cert. denied, 480 U.S. 908 (1987).*** Because Section 27A provides for a retroactive application in the law, this action may also be reinstated under ***Rule 60(b)(6). See Axel Johnson v. Andersen, Inc., 790 F.Supp. at 482.***

III. SECTION 27A DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

Petitioner also argues that Section 27A is unconstitutional because, in upsetting Petitioner's purportedly final judgment, Congress violated the doctrine of separation of powers. ***(Pet. 10-13).*** Respondent disagrees.

As held by numerous courts which have addressed this issue, Section 27A does not violate the doctrine of separation of powers, as it does not direct certain factual findings or imposes a rule of decision for Section 10(b) claims, nor does it remove or alter the constitutional adjudicatory function of the courts. ***See,***

e.g., Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992); Anixter v. Home-Stake Production Co., 977 F.2d 1533 (10th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1841 (1993); Wegbreitt v. Morley Orchards, 793 F.Supp. 965 (E.D.Wash. 1992); Brown v. Hutton, supra; Adler v. Berg Harmon Assoc., supra; Axel Johnson v. Arthur Andersen, supra. Instead, Section 27A prescribed a new period of limitations for the judiciary to apply to all Section 10(b) litigation pending on June 19, 1991. ***See, e.g., Anixter, 977 F.2d at 1545; Henderson, 971 F.2d at 1573.*** By so doing, Congress was exercising a key legislative power, that is, the enactment of a statute of limitations. ***Anixter, 977 F.2d at 1546.***

When Section 27A was enacted, the limitations period for private Section 10(b) claims was the federal rule borrowed from Section 9(e) adopted by this Court in ***Lampf.*** Section 27A changes the statute of limitations for cases filed prior to ***Lampf*** by replacing the borrowed federal rule with the limitations period previously applicable in each jurisdiction. As this Court noted in ***Musick, Peeler & Garrett v. Employers Ins. of Wausau, ___ U.S. ___, 113 S.Ct. 2085, 2089 (1993),*** "Congress did no more than direct the applicable 'limitation period for any private civil action implied under section 78j(b) of this title [Sec. 10(b) of the 1934 Act] that was commenced on or before June 19, 1991 [the day prior to issuance of ***Lampf, Pleva***]'." Thus, Section 27A does not revise a judgment of this Court; it belongs to the large category of statutes that alter the law in response to judicial interpretation. ***See West Virginia Univ. Hosp., Inc. v. Casey, ___ U.S. ___, 111 S.Ct. 1138, 1154-1155***

(1991) (Stevens, J., dissenting); Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 424-441 (1991).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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